Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

FUSHENG LIU,

Petitioner,

v.

KONINKLIJKE PHILIPS ELECTRONICS, N.V.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ANTON N. HANDAL
PAMELA C. CHALK
GABRIEL G. HEDRICK*
HANDAL & ASSOCIATES
1200 Third Avenue, Suite 1321
San Diego, CA 92101
(619) 544-6400

* *Counsel of Record* *Counsel for Petitioner*

225453

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a party contesting the jurisdiction of the district court must first move to vacate or set aside a default judgment pursuant to either Rule 55(c) or Rule 60(b) of the Federal Rules of Civil Procedure in the District Court as a prerequisite to appealing the default judgment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fusheng Liu ("Liu"), respectfully petitions the Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra.*, 1a-3a) has not been selected for publication in the Federal Reporter but can be found at 2009 WL 2030120 (9th Cir. 2009) and 328 Fed. Appx. 455. The opinion of the District Court on which Liu's appeal is based (App., *infra*, 4a-11a) is unreported.

BASIS FOR JURISDICTION

Judgment was entered in the United States Court of Appeals for the Ninth Circuit on July 1, 2009. This Court has jurisdiction to review the judgment of the Ninth Circuit pursuant to U.S.C. Const., Art. III, § 2, cl. 2 and 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

A. 28 U.S.C. § 1291

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District

Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

B. Federal Rule of Civil Procedure ("FRCP") 55(c).

"**Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)."

C. FRCP 60(b).

"**Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief."

D. FRCP 60(c)

"Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation."

E. Federal Rule of Appellate Procedure ("FRAP") 4(a)(1).

"(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

STATEMENT OF THE CASE

The instant matter presents a narrow question that bears broad implications. The Petitioner, Liu, challenges the dismissal of his appeal by the Ninth Circuit Court of Appeal which erroneously held that a party who contests the jurisdiction of the District Court must first bring a motion to set aside a default judgment under FRCP 55(c) and 60(b) as a prerequisite to challenging the judgment on appeal.

In the underlying District Court proceedings, Liu, a Chinese citizen domiciled in China, claimed that he was not properly served with a summons and complaint by reason of defective service. On special appearance, Liu moved to set aside his default pursuant to FRCP 55(c). The District Court granted Liu's motion but took the additional unprecedented step of laying out for the Respondent specific directions for effecting service of the complaint and summons through publication and mail.

Respondent Koninklijke Philips Electronics N.V. (hereinafter "Philips"), after following the District Court's directions, sought a subsequent entry of default, which was later reduced to a default judgment. Liu appealed the final judgment to the Ninth Circuit seeking to set aside the default judgment on the grounds that

the summons and complaint were not served as required by law. The Ninth Circuit, in dismissing the appeal, held that Liu's failure to bring a second motion under Rule 55(c) or 60(b) was a bar to the prosecution of his appeal of the default judgment.

The challenge to the Ninth Circuit's decision is founded on three discrete but substantial grounds.

1. No statute or regulation requires the filing of a motion under FRCP 55(c) or 60(b) as a predicate to the appeal of a final judgment;

2. The Ninth Circuit's decision is at odds with other Circuits' decisions over the application of FRCP 55(c) and 60(b) in similar circumstances; and

3. The Ninth Circuit Court's decision creates a precedent that potentially creates impediments to a party's rights to seek protections under the Fourteenth Amendment of the United States Constitution and Executive Branch treaties, specifically, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the "Hague Convention").

A. THE DISTRICT COURT PROCEEDINGS

Liu is a citizen and domiciliary of the People's Republic of China. He is and was the President/CEO of a number of companies that at one time manufactured and sold consumer electronics including, among other things, DVD recorders. These companies included KXD

Digital Entertainment, Ltd. (a Singapore company), Shenzhen Kaixinda Electronics Co., Ltd. (a Chinese company), Shenzhen KXD Multimedia Co., Ltd. (a Chinese company), and KXD Technology, Inc. (a California corporation) (hereinafter, collectively, the "KXD Companies"). The KXD Companies manufactured consumer electronics on behalf of a number of international companies such as, for example, Polaroid and Coby Electronics. They also manufactured and sold their own consumer electronics under the brand name "Astar."

On December 28, 2005, Philips, a Netherlands corporation, filed suit against a number of consumer electronics manufacturers including the KXD Companies. Fusheng Liu was not named as a defendant but was personally served with a copy of the complaint on behalf of the KXD Companies while at the Consumer Electronics Show ("CES") in Las Vegas, Nevada. The complaint alleged misappropriation of trade secrets, violation of the Lanham Act Unfair Competition, False Advertising, California Business & Professions Code Unfair Competition violations, and Conversion. The thrust of the complaint was Philips' allegation that the defendants infringed Philips' DVD+ReWritable ("DVD+RW") logo design (hereinafter, the "Trademark-In-Suit") by placing an identical or similar design on their products.

The complaint and first amended complaint allege three federal causes of action under 15 U.S.C. §§ 1114 and 1125 seeking both monetary and injunctive relief. The district court has original subject matter jurisdiction over these federal claims pursuant to

15 U.S.C. §§ 1116(a) and 1121(a) and 28 U.S.C. §§ 1331 and 1338(a). The complaint and first amended complaint also allege two pendent state law claims which arise from the same controversy and derive from a common nucleus of operative facts. The district court has jurisdiction over these pendent claims pursuant to 28 U.S.C. § 1367(a).

Liu was not added as a defendant in the case until September 2007. On October 2, 2007, Philips purportedly delivered a copy of the summons and first amended complaint to property Liu owned in San Marino, California (hereinafter, the "San Marino House"). The process server left copies of the summons and complaint with a person who answered the door named Annie An. They also purportedly mailed the papers the following day. Annie An was not a relative of Mr. Liu and did not reside at the home. Mr. Liu was not in the United States at the time and had only visited the house sporadically in the previous 3 years. His L1 visa expired in January 2008 and he had not been to the United States since July 2007.

On November 8, 2007, Philips moved for entry of clerk's default against Liu for failure to answer the complaint served on Ms. An. Less than a day later, the Clerk entered default against Liu. On December 17, 2007, Liu specially appeared through his counsel and moved to set aside the default on the ground that the service of the summons and complaint was defective. Liu argued that, though he had notice of the action, such notice was insufficient to cure defective service of process. He argued that service was defective because the San Marino House was not his dwelling house or

usual place of abode and that, even if it had been, Ms. An was not a resident of the San Marino House or otherwise authorized to accept service as required by FRCP 4(e) and Nevada Rule of Civil Procedure 4(d). Liu further argued that, because he was domiciled and residing in China, service was required to be effected pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the "Hague Convention") or otherwise through personal service upon his entry into the United States.

The District Court granted Liu's motion on February 4, 2008 and set aside the default. The District Court agreed that service was improper. The Court, although finding the San Marino House was Liu's dwelling or usual place of abode and that his wife and children resided there, found there was no admissible evidence that Ms. An resided at the San Marino House.

Upon setting aside Liu's default, the Court stated, "Given the difficulty presented in serving Defendant, the Court *will allow* Plaintiff to serve Defendant by publication." [Italics added.] The Court then ordered that a copy of the summons and complaint be mailed to the San Marino House and that service could be made by publication in a local Nevada newspaper "because Defendants already have actual notice of these proceedings." Liu's answer was due twenty (20) days after completion of service.

Following the District Court's directions, Philips' service on Liu was purportedly completed on March 15, 2008. Liu, who contests service was proper, did not answer. On April 9, 2008, Philips filed a request for entry of default and Liu's default was entered the next day.

Philips filed a motion for default judgment against Liu on May 2, 2008. Liu, still contesting service of the summons and complaint, did not oppose the motion. On May 9, 2008, the Court set a hearing on Philips' motion for June 11, 2008. A hearing on default judgment damages was held on June 11 and 12, 2008.

On July 2, 2008, the District Court entered judgment in favor of Philips and against the KXD Companies and Liu, jointly and severally, in the amount of $112,152,659.40 in damages, and $5,000,000.00 in punitive damages. The Court also granted Philips' motion for attorney's fees in the amount of $3,389,723.08.

Liu did not move to set aside the default under FRCP 55(c) and did not move to set aside the default judgment under FRCP 60(b) because the findings on which the District Court based its instructions to serve Liu – that Liu was domiciled at the San Marino House and that Liu had actual notice of the proceedings – had already been addressed by Liu in his first Rule 55(c) motion. Rearguing positions that were already addressed in the previous motion and rejected by the District Court would have been futile. In addition, Liu would have had to further argue to the very District Court that issued the Order that its specific directions for serving the summons and complaint were erroneous.

B. THE PROCEEDINGS IN THE NINTH CIRCUIT

Liu appealed the District Court's judgment entered against him on August 1, 2008. Liu argued that the District Court's February 4, 2008 Order authorizing service upon him by publication in a Nevada newspaper and by mail to the San Marino House was improper in that:

(1) the Court's finding that the San Marino House was Liu's domicile or usual place of abode was erroneous and not supported by the evidence;

(2) service as directed by the court in the February 4 Order was not permitted under FRCP 4(f)(3);

(3) that the allowance of service by publication in a Nevada newspaper failed to comport with the due process clause of the Fourteenth Amendment of the United States Constitution; and

(4) that service by publication was not authorized by either Nevada law (where the case was pending) or California law (where the San Marino House was located).

Though FRAP 27 and Ninth Circuit rules provide a vehicle for dismissing an appeal through a formal motion procedure, Philips requested dismissal of Liu's appeal in its answering brief. Relying on *Consorzio Del Prosciutto Di Parma v. Domain Name Clearing Co.*,

LLC, 346 F.3d 1193, 1195 (9th Cir. 2003) (hereinafter, "*Consorzio*") and *In re Lam*, 192 F.3d 1309, 1311 (9th Cir. 1999) (hereinafter, "*Lam*"). Philips argued that Liu's appeal must be summarily dismissed because Liu allegedly did not move under FRCP 55(c) or 60(b) to set aside the second default or the default judgment, respectively, entered against him. The Ninth Circuit, relying on these very same cases, dismissed the appeal.[1]

First and foremost, nothing in the plain language of Rules 55(c) or 60(b)[2] supports the opinions of the Ninth Circuit in *Consorzio* and *Lam*. These case precedents therefore amount to the creation of procedural requirements not otherwise required by the Federal Rules of Civil Procedure. The panels in *Consorzio* and *Lam* based their opinions not on the language of the Rules but on the gamesmanship of the appealing parties who as the District Courts in those cases found treated the Federal courts "like a casino game" and entered the

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[1] But *see Ackra Direct Marketing Corp. v. Fingerhut Corp.*, 86 F.3d 852, 855, fn. 3 (8th Cir. 1996) ["Appellants' decision not to file a Rule 60(b) motion does not hinder their appeal to this Court because a Rule 55(b) default judgment is a final judgment and may be appealed immediately"]; *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 170-171 (2nd Cir. 2001) [defendant has option of moving to vacate default judgment under FRCP 55(c) or 60(b) or, because default judgment is final, appealable order, skipping motion to vacate and appealing]; *U.S. v. Sang Woo Kim*, 242 Fed. Appx. 355, 357-358 (7th Cir. 2007) [defendant "was not required to challenge in the district court the entry of default before appealing the default judgment"].

[2] All subsequent references to "Rules" in this Petition refer to the Federal Rules of Civil Procedure unless otherwise indicated.

litigation "on sheer caprice." *See Lam*, *supra*, 192 F.3d at 1311 and *Consorzio*, *supra*, 346 F.3d at 1195 (*quoting Lam*).

In his reply brief and oral argument, Liu pointed out that Liu *did* successfully move to set aside the first default entered against him which addressed nearly all of the issues raised on the present appeal. For example, Liu moved to set aside the default pursuant to FRCP 55(c) on the ground, among other things, that the San Marino House was not Liu's "domicile" or "place of abode" and that, since Liu was domiciled and resided solely in China, the only available means of service was personal service in the United States or service under the Hague Convention.

Though Liu did not move to set aside the second default on the ground that service by publication was improper, his appellate argument underlying this issue — that Liu was not domiciled at the San Marino House — was already presented and ruled upon on his first Rule 55(c) motion. Furthermore, though Liu had argued in his first Rule 55(c) motion that actual notice of litigation is insufficient to cure defective service, the District Court nevertheless authorized service by publication in a Nevada newspaper on the ground that Liu had actual notice of the proceedings. These arguments had therefore already been made to the District Court. Presenting the same arguments again would not only have been improper, but futile and a waste of time and resources for all parties and the Court. Such an exercise in futility is not required under the plain language of either FRCP 55(c) or 60(b). *See Ackra Direct Marketing Corp. v. Fingerhut Corp.*, *supra*, 86

F.3d at 855, fn. 3. In *Ackra*, the Court held that an appellant's failure to make a motion to vacate a default judgment under Rule 60(b) was not a bar to the filing of an appeal of the judgment since the same arguments were duplicative of those made in response to a magistrates report and recommendation.

Liu also pointed out to the Ninth Circuit that the idea of requiring a party to make a Rule 60(b) motion prior to bringing an appeal is not supported by the plain language of the statute as Rule 60(c) makes clear that a Rule 60(b) motion, which may be made as much as a year after judgment is entered, does not affect the finality of the judgment. Accordingly, an aggrieved party would still be required to file an appeal within the time prescribed by FRAP 4 or otherwise lose his or her right to appeal the judgment. *See Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263, fn. 7 ["A motion for relief from judgment under Rule 60(b) . . . does not toll the time for appeal from, or affect the finality of, the original judgment"].

In other words, because that judgment is deemed final, even if a defendant moves to set aside a judgment under Rule 60(b), the time to appeal continues to tick. Under the rule advocated by Philips and the 9th Circuit, a party would be required to move to vacate a default judgment before filing an appeal. In many cases, as here, the time to appeal is 30 days after entry of judgment. FRAP 4(a)(1)(A). If the Court does not decide the motion within 30 days, the aggrieved party will have lost his or her right to appeal the final judgment.

In addition, none of the grounds raised on this appeal fit within the conditions for relief set forth in Rule 55(c) or 60(b). Liu does not appeal on the grounds of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; or (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable. FRCP 60(b). Nor do the grounds for appeal raised here fit into the catchall category of "any other reason that justifies relief" (FRCP 60(b)(6)) or "good cause" (FRCP 55(c)). *See Wagner v. U.S.*, 316 F.2d 871, 872 (2nd Cir. 1963) ["The catch-all clause of Rule 60(b)(6) . . . cannot be read to encompass a claim of error for which appeal is the proper remedy"].

The Ninth Circuit therefore mistakes the nature of the present appeal. The basis for Liu's appeal has little to do with the default judgment or even the default itself. Yes, Liu is seeking to overturn the default judgment, but the basis for Liu's appeal arose long before default and default judgment were entered. The bases for his appeal are the erroneous findings and defective instructions made by the District Court in its February 4, 2008 Order which was not ripe for appeal until after entry of judgment.

Liu was therefore left with the following choices after entry of that order: (1) appear even though he was

not properly brought under the Court's jurisdiction through proper service, (2) move to set aside the default on issues which were already decided by the Court which would have therefore been futile and a waste of judicial resources, or (3) wait until entry of the default judgment and appeal. Liu logically chose the last option. As set forth below, his election is consistent with the applicable statutes and rules of civil procedure.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A PARTY MUST FIRST MOVE TO SET ASIDE OR VACATE A DEFAULT JUDGMENT IN THE DISTRICT COURT BEFORE HE OR SHE IS PERMITTED TO APPEAL THE JUDGMENT

A. THE NINTH CIRCUIT DECISION IS AN UNWARRANTED ACT OF JUDICIAL LAWMAKING THAT IS UNSUPPORTED BY THE PLAIN LANGUAGE OF RULES 55(c) AND 60(b) AND THE POLICIES AND PURPOSES OF SAID RULES

The issue presented centers on the proper interpretation of existing statutes or rules by the District and Circuit courts. When interpreting a statute or rule, a Court must start with the language of the statute. *Knight v. C.I.R.*, 552 U.S. 181 (2008). In doing so, a Court should "resist reading words or elements into a statute that do not appear on its face." *Bates v. U.S.*, 522 U.S. 23, 29 (1997). Abandoning these principals, the Ninth Circuit, has infused into Rules 55(c)

and 60(b) a procedural hurdle that does not otherwise exist within the four corners of these Rules. In the process, the Ninth Circuit has established a group of precedents that conflict with decades of appellate practice.

Both Rule 55(c) and 60(b) specify the grounds by which a District Court may set aside an order or judgment. They do not prescribe any procedural prerequisites or requirements that are not articulated therein. Nothing in the plain language of either Rule, including their subsections, requires a party to make a motion in the District Court to set aside or vacate an order or judgment as a prerequisite to appeal. Through its case precedent (*see Consorzio, supra* 346 F.3d at 1195 and *Lam, supra*, 192 F.3d at 1311), the Ninth Circuit has created an extra-statutory procedural construct that was not otherwise authorized or intended by the Supreme Court.

28 U.S.C. § 1291 is clear that the "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." While the primary policy behind the statute is to avoid piecemeal appeals, one cannot ignore the clear effect of this provision in conferring jurisdiction upon the Federal Courts of Appeals over all appeals from final decisions of the District Courts. *See, e.g., Ackra Direct Marketing Corp. v. Fingerhut Corp., supra*, 86 F.3d at 855, fn. 3.

The Ninth Circuit's decisions in *Consorzio, Lam* and the present case, however, have the undesired effect of divesting the Federal Courts of Appeals of appellate

jurisdiction over certain final decisions. Read in conjunction with the filing deadlines of FRAP 4(a) and FRCP 60(c), the Ninth Circuit decisions compound the problem by potentially foreclosing a party's right to appeal the judgment. This happens in cases where, as here, the appellant is the unlucky recipient of default judgment and, though Rule 60(c) allows him as much as a year to move to vacate the judgment, he is denied the right to an appeal if he does not first file the Rule 60(b) motion and obtain a decision within the thirty (30) day appeal deadline of FRAP 4(a). The window for appealing the final default judgment is therefore closed. By establishing this so called exhaustion of remedies requirement into Rules 55(c) and 60(b), the Circuit Court of Appeals is effectively divesting itself of appellate jurisdiction in these cases. Clearly, however, these rules were not intended to create an exhaustion requirement in advance of a right to appeal.

It is generally accepted that Rule 60 was created to codify and simplify common law methods of gaining equitable relief from unfair judgments *after* the time for appeal has expired — not to establish a perquisite to filing an appeal of a final judgment. *Lafferty v. District of Columbia*, 277 F.2d 348, 351, fn. 6 (D.C.Cir. 1960) (*citing* 3 Barron & Holtzoff, *Federal Practice and Procedure* § 1321 (1958)), *accord Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 696 (5th Cir. 1983).

The Supreme Court adopted Rule 60 in 1938 to provide the District Courts with some "flexibility" to set aside or alter their own final judgments. *See* Moore &

Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 626, *et seq.* (1946). At the time the rule was promulgated:

> "the term of court was the critical factor in the district court's power over its final judgments at law and in equity. While the district court had plenary power over such judgments during the term, it was in general without power to reconsider its final judgments at law and in equity after the expiration of the term, unless (1) the proceeding seeking relief was begun within the term, or (2) the court, during the term, reserved control over the judgment and the proceeding seeking relief was begun within that extended period." *Id.* at 627; *see also U.S. v. Mayer*, 35 U.S. 55 (1914) [illustrating the effect of the so-called "term rule"].

Due to the harshness of the term rule and its unequal application, Rule 60 was adopted among other rules to set definite time limits for challenging judgments and orders and to codify the grounds under which such motions may be brought for reconsidering them (formerly embodied in archaic and confusing equitable writs, *e.g.*, *coram nobis*, *coram vobis*, *audita querela*, etc.). Moore & Rogers, *Federal Relief from Civil Judgments*, *supra*, 55 Yale L.J. at 627, 630, *et seq.*

Like the "ancient" writs that it replaced, Rule 60(b) was designed to provide a party with equitable relief from a judgment after the expiration of the time for appeal. *Lafferty*, *supra*, 277 F.2d at 351, fn. 6. It is clear

then that Rule 60 was not intended to set up a prerequisite to the prosecution of an appeal but rather to give a party a chance to seek the District Court's correction of an otherwise erroneous decision where the time to appeal had already expired.

As with all Rules of Civil Procedure, Rule 55(c) was adopted to promote a public policy in favor of decisions on the merits, a policy that certainly applies to this petition. *See, e.g., Kennerly v. Aro, Inc.*, 447 F.Supp. 1083, 1089 (D.Tenn. 1977) (*citing Foman v. Davis*, 371 U.S. 178, 181-182 (1962)). The rule and the policy behind it are designed to protect the defaulting party. Nothing in the rule suggests that a party must make a motion under Rule 55(c) to set aside a default or forever lose the right to challenge, as here, the sufficiency of service. Such a rule as adopted by the Ninth Circuit fails to comport with the public policy behind Rule 55(c).

The decision of the Ninth Circuit in the case at bar is an unjustifiable act of legislating from the bench which is not supported by the Federal Rules of Civil Procedure. Such judicial lawmaking represents a substantial digression from the accepted and usual course of judicial proceedings and justifies the granting of the instant petition.

B. THE RULE FASHIONED IN THIS CASE BY THE NINTH CIRCUIT IS AT ODDS WITH THE DECISIONS OF AT LEAST THREE OTHER CIRCUITS

Certainly, to say that a statute or rule *authorizes* a certain act is not to say that the same statute or rule *mandates* such an act. The Ninth Circuit apparently stands alone in applying an exhaustion requirement in cases involving appeals of default judgments. The Second Circuit holds that a defendant against whom a default judgment has been entered has the option of either moving to vacate the default judgment pursuant to Rule 55(c) or 60(b) or, since a default judgment is a final appealable order, skipping the motion to vacate and appealing.[3] *See Pecarsky v. Galaxiworld.com Ltd.*, *supra*, 249 F.3d at 170-171. Similarly, the Seventh Circuit holds that a defendant is "not required to challenge in the district court the entry of default before appealing the default judgment." *U.S. v. Sang Woo Kim*, *supra*, 242 Fed. Appx. at 357-358. Finally, the Eighth Circuit has held that a party may appeal the entry of default judgment without having first brought a motion to vacate pursuant to Rule 60(b) because default judgment is a final judgment subject to appeal pursuant to

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[3] This option is also evidenced from the California law on which Rule 60(b) is based. *See Federal Relief from Civil Judgments*, *supra*, 55 Yale L.J. at 644 ["the California decisions are helpful to the extent that they show that Section 473 of the California Code (from which Rule 60(b) was adopted) is not exclusive . . . [¶] Judicial error may be remedied by motion for new trial; by motion to vacate a judgment or decree . . . ; and by appeal].

28 U.S.C.§ 1291. *Ackra Direct Marketing Corp. v. Fingerhut Corp., supra*, 86 F.3d at 855, fn. 3.

The holdings in *Pecarsky*, *Kim*, and *Ackra* stand for the proposition that a right to set aside a default or a final judgment under Rules 55(c) and 60(b) and the right to appeal a final judgment are mutually exclusive. These holdings are consistent with a slew of other Circuit and District Court authority holding that Rule 60(b) was not intended to supersede the normal and ordinary channels of relief, namely appeal to the Circuit Courts of Appeal. *See, e.g., In re SDDS, Inc.*, 225 F.3d 970 (8th Cir. 2000), *cert. denied* 532 U.S. 1007, [motion for relief from judgment cannot be used to relitigate the merits of a district court's prior judgment in lieu of a timely appeal]; *McKnight v. U.S. Steel Corp.*, 726 F.2d 333 (7th Cir. 1984) [Rule 60(b) is not intended to correct errors of law made by district court in the underlying decision which resulted in final judgment, and thus the appropriate way to seek review of trial court's alleged error was by timely appeal]; *Swam v. U.S.*, 327 F.2d 431 (7th Cir. 1964), *cert. denied* 379 U.S. 852, [this rule was not intended to be an alternative method to obtain review by appeal or as means of enlarging by indirection time for appeal]; *Loucke v. U.S.*, 21 F.R.D. 305 (S.D.N.Y.1957) [Rule 60(b) was not designed to supersede the normal and ordinary channels of relief]; *Selkridge v. United of Omaha Life Ins. Co.*, 237 F.Supp.2d 600 (D.Virgin Islands 2002), *aff'd* 360 F.3d 155 [motion for relief from judgment due to mistakes, inadvertence, excusable neglect, newly discovered evidence, or fraud, may not be used as substitute for appeal]; *Martin v. Chemical Bank*, 940 F.Supp. 56 (S.D.N.Y.1996), *aff'd* 129 F.3d 114 [rule governing relief

from judgment may not be used as a substitute for a timely appeal]; *U.S. v. Johnson*, 934 F.Supp. 383 (D.Kan.1996) [Not substitute for direct appeal; it is *not opportunity for court to revisit issues already addressed in underlying order* or to consider arguments and facts that were available for presentation in underlying proceedings].

The decision of the Ninth Circuit in this case conflicts with current case law in the Second Circuit, Seventh Circuit and Eighth Circuit. Such conflict will necessarily lead to confusion amongst litigants within those Circuits and particularly outside those Circuits as to the proper procedure for challenging a default judgment. The Supreme Court should therefore grant this Petition in order to resolve these conflicts.

C. GIVEN THE FACTS OF THIS CASE, THE NINTH CIRCUIT'S DECISION CREATES A PRECEDENT WHICH POTENTIALLY CREATES IMPEDIMENTS TO A PARTY'S RIGHTS TO SEEK PROTECTIONS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND EXECUTIVE BRANCH TREATIES, SPECIFICALLY, THE HAGUE CONVENTION

There is an erosion factor at work here - erosion in the principals of due process and Executive authority. The law is simply that "before a court may exercise personal jurisdiction over a defendant, there must be *more than* notice to the defendant . . . [t]here also must be a *basis* for the defendant's amenability to service of

summons. Absent consent, this means there must be *authorization* for service of summons on the defendant." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, (1987) (emphasis added). An individual or entity "is not obliged to engage in litigation unless [officially] notified of the action . . . under a court's authority, by formal process." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999).

This Petition on its surface concerns the procedural question of whether a defendant must move to set aside a default or default judgment in a District Court pursuant to Rule 55(c) or 60(b). Nonetheless, deeper and far more significant issues of due process are unavoidably intertwined. In addition, this case also implicates the integrity of the Hague Convention which the District Court conspicuously attempted to circumvent by authorizing service by mail and by publication in a newspaper in Nevada where Liu had never resided. By sidestepping the appeal in the way it did, the Ninth Circuit avoided having to deal with the trampling of Mr. Liu's rights and privileges under the United States Constitution and The Hague Convention Treaty.

The District Court in this case appeared to be driven by a perceived difficulty, unsupported by the evidence, in serving Liu with the summons and complaint. It is unclear from the District Court's conclusory findings whether this perceived difficulty was rooted in Liu being domiciled in China or in a belief, again unsupported by any evidence that Liu was attempting to avoid service. In either case, the applicable rules of civil procedure provide relief to a Plaintiff: in the former circumstance,

Philips could have attempted to personally serve Liu or to otherwise serve him in accordance with the Hague Convention and in the latter circumstance, Philips could have made a showing to the District Court that Liu was evading service and the District Court could have fashioned an appropriate remedy in accordance with the service statutes. However, there was no attempt by Philips to personally serve Liu (other than the one defective attempt to serve his children's babysitter) or to serve him in accordance with the Hague Convention. Likewise, Philips made no attempt to show that Liu had been attempting to evade service nor could it have.

By dismissing Liu's appeal and forcing other foreign defendants like him who challenge a District Court's jurisdiction, who seek to vindicate their due process rights under the Fourteenth Amendment, and/or who are subject to executive branch treaties such as the Hague Convention, to jump through the additional hurdle of making a Rule 55(c) or 60(b) motion is an unnecessary and burdensome impediment to a party's rights to enforce those privileges and protections. The rule fashioned by the Ninth Circuit in the instant case is therefore inconsistent with these rights as well as with the applicable statutory scheme for appealing final judgments and with the law of at least three other Circuits.

The Court should therefore grant certiorari to vindicate civil defendants' due process rights under the Fourteenth Amendment of the Constitution and to resolve the obvious conflicts caused by the Ninth Circuit decisions challenged herein.

CONCLUSION

Based on the foregoing, Liu respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ANTON N. HANDAL
PAMELA C. CHALK
GABRIEL G. HEDRICK*
HANDAL & ASSOCIATES
1200 Third Avenue, Suite 1321
San Diego, CA 92101
(619) 544-6400

Counsel for Petitioner

* *Counsel of Record*

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 1, 2009

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 08-16763.

KONINKLIJKE PHILIPS ELECTRONICS, N.V.,

Plaintiff-Appellee,

v.

Fusheng LIU, AKA **Liu Fusheng**, AKA Fu Sheng Liu,

Defendant-Appellant,

and

KXD Technology, Inc.; Astar Electronics, Inc.; Astar Electronics USA, Inc.; Shenzhen KXD Multimedia Co., Ltd.; Shenzhen Kaixinda Electronics Co. Ltd.; KXD Digital Entertainment, Ltd.; Jingyi Luo, AKA James Luo; Sungale Group, Inc.; Sungale Electronics (Shenzhen), Ltd.; Amoi Electronics, Inc.; Amoi Electronics Co., Ltd.; Amoi Electronics, Ltd.; China Electronics Corporation; Amoisonic Electronics, Inc.; International Norcent Technology, Inc.; Norcent Holdings, Inc.; Shanghai Hongsheng Technology Co., Ltd.; Shenzhen Newland Electronic Industry Co., Ltd.; Desay A&V (USA) Inc.; Desay A&V Science &

Appendix A

Technology Co., Ltd.; Desay Holdings Co., Ltd.; Xoro Electronics (Shanghai) Ltd.; Shenzhen Xoro Electronics Co. Ltd.; Mas Elektronik AG Corporation; Shenzhen Oriental Digital Technology Co., Ltd.,

Defendants.

Argued and Submitted June 3, 2009.

Filed July 1, 2009.

Before: RAWLINSON and BYBEE, Circuit Judges, and BURNS FN*, District Judge.

MEMORANDUM FN**

Fusheng Liu (Liu) appeals from the district court's entry of default judgment against him. However, because Liu failed to file a motion in the district court under either *Federal Rule of Civil Procedure* 55(c) or 60(b) seeking to set aside the second entry of default or entry of default judgment, *Consorzio del Prosciutto di Parma v. Domain Name Clearing Company, LLC*, 346 F.3d 1193, 1195 (9th Cir. 2003) mandates dismissal. Liu's "argument that service was insufficient is not a matter properly before this court." *Id.*

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* The Honorable Larry Burns, United States District Judge for the Southern District of California, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appendix A

Nothing in Rule 27 of the Federal Rules of Appellate Procedure or the Rules of the Ninth Circuit required Appellee to file a motion to dismiss the appeal before raising Liu's failure to seek relief from the default judgment.

APPEAL DISMISSED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA FILED FEBRUARY 4, 2008

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No.: 2:05-cv-01532-RLH-GWF
Case No.: 2:06-cv-00101-RLH-GWF

KONINKLIJKE PHILIPS ELECTRONICS N.V.,
a Netherlands Corporation,

Plaintiff,

vs.

KXD TECHNOLOGY, INC.; ASTAR ELECTRONICS, INC.; ASTAR ELECTRONICS USA, INC.; SHENZHEN KXD MULTIMEDIA CO., LTD.; SHENZHEN KAIXINDA ELECTRONICS CO., LTD.; KXD DIGITAL ENTERTAINMENT, LTD.; JINGYI LUO, a/k/a JAMES LUO; FUSHENG LIU, a/k/a LIU FUSHENG, a/k/a FU SHENG LIU; SUNGALE GROUP, INC.; SUNGALE ELECTRONICS (SHENZHEN), LTD.; AMOI ELECTRONICS, INC.; AMOI ELECTRONICS CO., LTD.; AMOI ELECTRONICS, LTD.; CHINA ELECTRONICS CORPORATION; AMOISONIC ELECTRONIC ELECTRONICS, INC.; INTERNATIONAL NORCET TECHNOLOGY, INC.; NORCENT HOLDINGS, INC.; SHANGHAI HONGSHENG TECHNOLOGY CO., LTD.; SHENZHEN NEWLAND ELECTRONIC INDUSTRY CO., LTD.; DESAY A&V

(USA), INC.; DESAY A&V SCIENCE & TECHNOLOGY CO., LTD.; DESAY HOLDINGS CO., LTD.; XORO ELECTRONICS (SHANGHAI), LTD.; SHENZHEN XORO ELECTRONICS CO., LTD.; MAS ELEKTRONIK AG CORPORATION; SHENZHEN ORIENTAL DIGITAL TECHNOLOGY CO., LTD.; and JOHN DOES 1 THROUGH 20,

Defendants.

ORDER

(Motion to Set Aside Entry of Default-#809)

Before the Court is Defendant Fusheng Liu's **Motion for Relief from Default and to Quash Service of Summons and Complaint** (#809) (the "Motion"), filed December 17, 2007. The Court has also considered Plaintiff's Opposition (#814), filed January 4, 2008, and Defendant's Reply (#816), filed January 15, 2008.

BACKGROUND

Defendant is President of corporations KXD Digital Entertainment, Ltd., Shenzhen KXD Multimedia Co., Ltd. and Shenzhen Kaixinda Electronics Co., Ltd; and is the former President of KXD Technology, Inc. All these corporations are currently Defendants in the instant case.

On September 19, 2007, the Court granted Plaintiff's motion to amend the Complaint to add

Fusheng Liu as a Defendant. The First Amended Complaint ("FAC") was filed on September 27, 2007. Summons was issued on October 1, 2007. On October 2, 2007, Plaintiff left a copy of the Summons and FAC at Fusheng Liu's home located at 1825 Carlisle Drive, San Marino, California 91108, with a person named Annie An. Annie An is either the nanny or babysitter of Defendant's children. Defendant was not at home at the time service was made, but his wife and children were. On October 3, 2007, Plaintiff mailed the same papers to the San Marino address.

On November 8, 2007, Plaintiff moved for entry of Clerk's default against Defendant. On November 9, 2007, the Clerk entered default against Fusheng Liu. On December 17, 2007, Defendant brought the instant Motion to set aside default and quash service of process.

For the reasons stated below the Court grants Defendant's Motion. The Court also gives Plaintiff leave to serve Defendant by publication.

DISCUSSION

I. Standard for Setting Aside Default

A court may set aside an entry of default "for good cause shown." Fed. R. Civ. P. 55(c). Failure to properly serve a defendant with process pursuant to Fed. R. Civ. P. 4 constitutes good cause to set aside an entry of default. *See generally Veeck v. Commodity Enters., Inc.*, 487 F.2d 423, 425-26 (9th Cir. 1973) (failure to serve

properly constituted a lack of jurisdiction to enter default judgment, thus default judgment was set aside); *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir. 1992) (default judgment is void where a plaintiff fails to serve process properly). The Court finds that process was never properly served on Defendant Fusheng Liu and thus grants the Motion to Set Aside Entry of Default and Motion to Quash Service of Process (Dkt. #809).

A. Service of Summons and Complaint

Plaintiff argues that the service effected on Ms. Annie An on October 2, 2007, should be sufficient as to Defendant. Plaintiff also contends that because Defendant was aware of the litigation default should not be set aside. The Court disagrees. The Supreme Court has held that it is a bedrock principle that "[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, *and* brought under a court's authority, by formal process." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999) (emphasis added) (thirty-day time line to remove case to federal court did not begin when defendant received a file-stamped facsimile of the complaint, but only after formal service of process obliged defendant to engage in litigation).

There is no dispute that Defendant Fusheng Liu is aware of the action and has been for a long time; however, only recently was Fusheng Liu named as a Defendant in the FAC and the Court finds that Plaintiff has failed to bring him under the Court's authority by formal process.

Appendix B

(1) Rules Governing Service Upon Individuals Within United States

Federal Rule of Civil Procedure ("FRCP") 4 governs service of process. According to FRCP 4(e) service may be made upon individuals within the United States according to FRCP 4(e)(2) or by the laws of the state (a) where the action is pending, or (b) where the defendant is served. Therefore, compliance with either the Federal, Nevada or California rules of service upon an individual within the United States apply to Defendant. Each set of rules allows for service by satisfying three basic elements: (a) by leaving copies of the Summons and Complaint at the defendant's "dwelling" or "usual place of abode"; (b) with someone "of suitable age and discretion" or who is "competent . . . [and] at least 18 years of age"; and (c) who "resides", is "residing" or is a "member of the household." *See* Fed. R. Civ. P. 4(e)(2)(B), Nev. R. Civ. P. 4(d)(6), Cal. C. Civ. P. § 415.20(b).

(a) Dwelling or Usual Place of Abode

The Court finds that under any of these sets of rules that the San Marino property is a dwelling or usual place of abode for Defendant. There is no dispute that he visits the property multiple times throughout the year. There is also no dispute that his wife and children were there for at least half of last year, including the time of service. There is no dispute that he owns the residence. Therefore, the Court finds that the San Marino property satisfies this element of the rules. *See Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang,* 105 F.3d 521, 524

(citing *Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 257 (2d Cir. 1991) for the proposition that a person can have more than one dwelling house or usual place of abode for purposes of the rule).

(b) Someone of Suitable Age, Discretion, and Competency

No one disputes whether Annie An was of suitable age, discretion, or competency. Therefore, the Court finds that this element is satisfied.

(c) Resides, Residing, or is a Member of the Household

This element is where Plaintiff has failed to meet its burden of proper service. There is no admissible evidence that Annie An resided, or was a member of the household, at the time of service. Plaintiff only submits the declaration of Tim Santoni as evidence that Annie An was a resident. On September 21, 2007, Mr. Santoni was searching the San Marino home for counterfeit products. He states in his declaration: "During my search, I was informed that one of the rooms in the household belonged to 'the children's nanny.' . . . When we looked in the nanny's room, it was clear that someone was living there, as there were woman's clothes in drawers and other personal belongings in the room." (Dkt. #814, Santoni Decl. ¶ 4.)

Therefore, the only evidence that the Annie An resided in the home is based on inadmissible hearsay.

There is also no foundation as to who told Mr. Santoni this information. Furthermore, Defendant submits the declaration of his wife Qin Zhou which states that the clothes and personal belongings in the room are hers. (Dkt. #816, Zhou Decl. ¶ 12.) Zhou also declares that Annie An did not reside in the San Marino home. (*Id.* at ¶ 6.)

Because there is no admissible evidence that Annie An is a resident or member of the household, the Court finds that she does not satisfy the third element of the relevant service statutes. The Court therefore finds the service was improper. Therefore, Defendant's Motion is granted.

Given the difficulty presented in serving Defendant, the Court will allow Plaintiff to serve Defendant by publication. The Court finds that Defendant resides out of the state, that a cause of action exists against him, and that he is a proper party to the action.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Fusheng Liu's Motion to Set Aside Entry of Default and Motion to Quash Service of Process (#809) is GRANTED as follows:

IT IS FURTHER ORDERED that the Clerk's Entry of Default (#801) is hereby VACATED and service

of process is QUASHED only as to Defendant Fusheng Liu.

IT IS FURTHER ORDERED that Plaintiff shall mail another copy of the Summons and Complaint to Fusheng Liu's San Marino home address through the post office.

IT IS FURTHER ORDERED that Plaintiff may serve process by publication in accord with Nev. R. Civ. P. 4(e)(1). Publication will only be required in a local Nevada newspaper because Defendants already have actual notice of these proceedings. Therefore, the publication shall run once a week, in the Las Vegas Review-Journal or Las Vegas Sun for a period of four weeks. This will constitute service on the Defendant.

IT IS FURTHER ORDERED that Fusheng Liu's answer is due twenty (20) days after service of process is completed.

Dated: February 4, 2008.

s/ Roger L. Hunt
ROGER L. HUNT
Chief United States District Judge

Supreme Court, U.S.
FILED
JAN 20 2010
OFFICE OF THE CLERK

No. 09-389

IN THE

Supreme Court of the United States

FUSHENG LIU,
Petitioner,

v.

KONINKLIJKE PHILIPS ELECTRONICS N.V.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

STEVEN H. MORRISSETT
Counsel of Record
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.
3300 Hillview Avenue
Palo Alto, California 94304
(650) 849-6600

ERIKA H. ARNER
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.
Two Freedom Square
11955 Freedom Drive
Reston, Virginia 20190
(571) 203-2700

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the chief executive officer of named defendant corporations, who

(1) was personally served with the original complaint on behalf of his defendant companies,

(2) thereafter directed his companies to continue their illegal activities during the court proceedings and to engage in litigation misconduct in violation of court orders resulting in contempt sanctions,

(3) has never disputed that he received the amended complaint that added him as a defendant in the case,

(4) specially appeared through his attorney to contest the sufficiency of the first service of the amended complaint on him,

(5) after the district court granted his motion to set aside a first entry of default and ordered service again by publication and other methods, made no effort to move to set aside the second service, object to it or otherwise present his arguments to the district court why the second service was insufficient that he now argues on appeal,

(6) directed his attorney to appear at the second default judgment hearing only on behalf of his defendant companies but explicitly not on his personal behalf,

may now invoke this Court's certiorari jurisdiction to further avoid the judgment of the U.S. courts resulting from his failure to appear and defend himself, where established case law in the Ninth Circuit Court of Appeals required Petitioner to seek relief from a default in the District Court before appealing the default.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent states that it has no parent company and no publicly held company owns 10% or more of its stock.

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IN THE

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No. 09-389

FUSHENG LIU,

Petitioner,

v.

KONINKLIJKE PHILIPS ELECTRONICS N.V.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

DECISIONS BELOW

Petitioner appears to have misidentified the opinion of the District Court on which Petitioner's appeal to the Ninth Circuit was based. Furthermore, the petition appendix does not include copies of the judgment, decision, findings of fact, and conclusions of law entered by the District Court as required by Supreme Court Rule 14(i).

The petition states that "the opinion of the District Court on which Liu's appeal is based (App., *infra*, 4a-11a) is unreported." Pet. 1. The document reproduced at pages 4a-11a of the petition appendix is not,

however, the decision on which Petitioner based his appeal to the Ninth Circuit. Rather, it is an earlier order entered by the District Court on February 8, 2008. Pet. App. 11a.

Petitioner filed a Notice of Appeal to the Ninth Circuit on August 1, 2008. Pet. 10. As noted by the Ninth Circuit, Petitioner actually appealed from the default judgment entered by the District Court on July 2, 2008. Pet. App. 2a. The default judgment, findings of fact, conclusions of law, and decision entered by the District Court are included in Respondent's Appendix, *infra*, 1a-31a.

STATEMENT OF THE CASE

A. Proceedings Prior To The Default Judgment

Petitioner Fusheng Liu is the president of several corporate defendants in the proceedings below, including KXD Digital Entertainment, Ltd., Shenzhen KXD Multimedia Co., Ltd., and Shenzhen Kaixinda Electronics Co., Ltd., and he was president of defendant KXD Technology, Inc. until its chapter 7 bankruptcy in 2007. Resp. App., *infra*, 11a. Petitioner controlled over 75 percent of the stock of these four corporate defendants (collectively, the "KXD Defendants"). *Id.* He was responsible for the day-to-day operations of the KXD defendants. *Id.*

On January 6, 2006, while Petitioner was manning a booth at the annual Consumer Electronics Show in Las Vegas, Nevada, the U.S. Marshals Service served the KXD Defendants with the original complaint by personally serving Petitioner on behalf of his companies. *Id.* at 11a-13a. The U.S. Marshals Service also executed on Petitioner a temporary restraining

order and seizure order for counterfeiting a registered trademark owned by Philips. Although Petitioner and others had been displaying counterfeit products bearing Philips' trademark at their booth earlier that day, Petitioner remained silent when his subordinate, codefendant Jingyi Luo, denied having displayed any counterfeit goods, forcing the U.S. Marshals to unearth the counterfeits that had just been concealed. *Id.* Petitioner was not a named defendant in the original complaint. *Id.*

Throughout the litigation that followed, Petitioner's companies defied Philips and the Nevada District Court at every turn. The District Court issued multiple temporary restraining orders and seizure orders, a preliminary injunction, and discovery orders, and eventually held the KXD corporate defendants in contempt. The Ninth Circuit summarized the companies' disobedience in a separate appeal, explaining that Petitioner saw to it that his companies ignored every court order until "it became clear to the district court that the defendants had no intention of complying with its orders." *Koninklijke Philips Electronics N.V. v. KXD Technology, Inc.*, 539 F.3d 1039, 1041 (9th Cir. 2008). The District Court awarded Philips $1.67 million in contempt damages, costs, and attorneys' fees, and ordered a $2 million bond to cover future violations. *Id.* In an effort to force Petitioner's companies to comply with court orders, the District Court also assessed $10,000 per day in coercive sanctions. *Id.*

Petitioner's companies represented they had a net worth of 50 million dollars and inventory in the United States of more than ten million dollars, but never paid the $1.67 million for damages and costs, never posted the $2 million bond, and never paid any

of the sanctions that accrued due to their violations of court orders. SER 0094-105.[1] Instead, they continued defying the District Court's orders to end the counterfeiting, reaping further millions of dollars from sales of counterfeit products. *Id.*; Resp. App., *infra*, 28a. Consequently, the District Court granted Philips' motion to freeze KXD's assets. SER 0094-105. Later, the court expressly added Petitioner as a person covered by the asset freeze. SER 0222.

Philips recognized that Petitioner orchestrated his companies' disdain for the court's orders and Philips' property rights. In addition, Petitioner had acted to avoid liability both in keeping his companies undercapitalized, Resp. App., *infra*, 11a, and in hiding his assets and his companies' evidence of substantial income. Resp. App., *infra*, 17a-18a. As a result of Petitioner's active role in the counterfeiting and continued violation of court orders, Philips filed a motion to add Petitioner as a defendant. Its associated, amended complaint was filed September 27, 2007. *Id.* at 19a. The Summons issued October 1, 2007, and on October 2, 2007, a copy of the Summons and First Amended Complaint were delivered to Petitioner's home in San Marino, California and left with a woman named Annie An, who was either a babysitter or nanny for Petitioner's children. Pet. App. 6a. Philips' process server then mailed a copy of the papers to the San Marino house. ER 00199. Petitioner acknowledged that he and his wife owned the San Marino house. Pet. App. 8a. Petitioner also acknowledged that for at least six months in 2007, including at the time of service, Petitioner's wife and

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[1] Citations to the record at the Ninth Circuit are designated as Appellant's Excerpts of Record, "ER," and Appellee's Supplemental Excerpts of Record, "SER."

two children lived in the San Marino house and that his son was born there in September 2007. ER 00199. Petitioner also has never disputed that he received the Summons and the First Amended Complaint that were delivered to the San Marino house. *See, e.g.*, ER 00075-90, 00184-193, 00198-200.

B. The Default Judgment

Philips filed its proof of service on Ms. An and on November 9, 2007, obtained a first entry of clerk's default when Petitioner did not answer the complaint. On December 17, 2007, Petitioner moved to set aside the default and quash service of process. On February 4, 2008, the Nevada District Court granted Petitioner's motion to vacate the default and quash the service as to the Petitioner. Pet. App. 4a-11a. The court made findings that the San Marino house was Petitioner's place of abode and that Annie An was someone of suitable age and discretion. *Id.* at 8a-9a. The court decided, however, that Ms. An was not a "resident or member of the household [at the San Marino house]." *Id.* at 9a-10a.

The District Court then concluded that "[g]iven the difficulty in serving [Petitioner], the Court will allow Plaintiff to serve Defendant by publication." *Id.* at 10a. The District Court, finding that Petitioner already had actual notice of the proceedings, ordered Respondent to serve Petitioner by publication in a Las Vegas newspaper in accord with Nev. R. Civ. P. 4(e)(1) and to mail another copy of the service papers to him at the San Marino house. *Id.* at 11a.

Respondent promptly complied with the District Court's order and served the complaint by publication and mail. When Petitioner again did not file an answer, Respondent sought default for a second time.

The clerk entered a second default against Petitioner on April 10, 2008. ER 00301-02 (D.I. 841). Unlike the first default, Petitioner did not move to have the court set aside the second default. On May 2, 2008, Philips filed a motion for default judgment, which Petitioner also did not oppose. At the June 11 hearing on default damages, Petitioner did not appear, although his counsel did. At the hearing Petitioner's counsel informed the District Court that he was appearing *"only"* on behalf of Petitioner's companies, but not on behalf of Petitioner. ER 00217 (original emphasis in the court's minutes).

On July 2, 2008, the Nevada District Court entered judgment, jointly and severally, against Petitioner and his companies, the KXD defendants. Resp. App., *infra*, 3a-6a. Despite defendants' discovery abuses, the court found an "overwhelming amount of evidence produced as to the legitimacy of Plaintiff's claims" and "no doubt" as to the legitimacy of the claims. *Id.* at 25a. Even in view of the strong policy favoring a decision on the merits, the court concluded:

> The KXD Defendants' failures and defaults in this case are due to their own willful conduct. The KXD Defendants could have avoided default had they been more forthcoming. As it is, the Court has extended itself as far as it can to afford the KXD Defendants their fair day in court to defend themselves fully. Accordingly, and for the reasons set forth above, the Court finds that all the *Eitel* factors weigh in favor of granting default judgment in this instance.

Id. at 26a.

The judgment, which included treble and punitive damages, exceeded $100 million. Petitioner took no action in the Nevada District Court to set aside the second default or the default judgment entered against Petitioner.

After declining to contest the default and the ensuing default judgment in the District Court, Petitioner appealed to the Ninth Circuit seeking to set aside the judgment. Because Petitioner had not moved to set aside the default or to set aside the default judgment, the Ninth Circuit dismissed the appeal. Pet. App. 2a-3a.

REASONS WHY THE PETITION SHOULD BE DENIED

"A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Here, Petitioner has failed to offer any compelling reason that his case warrants review by this Court. Instead, the narrow procedural question presented masks Petitioner's true intention to seek this Court's review of erroneous factual determinations and legal issues not decided by the courts below. This Court's general practice of declining to review facts or decide issues not considered below should be reason enough to deny the petition. But even if the Court wanted to consider the actual question presented, this case would be a poor vehicle for it. Ample alternative grounds support the affirmance of the default judgment entered by the District Court, so even a favorable ruling on the question presented would not impact the ultimate outcome of Petitioner's case. Although Petitioner attempts to manufacture a circuit split on the procedural question presented, there is neither a genuine split of authority nor an issue of

wide applicability presented here. For these additional reasons, the petition for a writ of certiorari should be dismissed.

I. The Petition Should Be Denied Because Petitioner Seeks This Court's Review Of Factual Findings And Issues Not Decided By The Courts Below

While on its face the petition purports to present a procedural question regarding appeal from default judgment, Petitioner admits that his true aim is to contest factual findings by the District Court and argue issues that were not reached by the Ninth Circuit below.

A. Fact Disputes Like That Urged By Petitioner Do Not Merit Review By This Court

Petitioner admits that the basis for his petition has "little to do with the default judgment" that he appealed in the decision below. Pet. 14. Instead, Petitioner seeks review of the District Court's findings regarding Petitioner's domicile and the difficulties in serving process on Petitioner. *Id.* at 12, 23. Conspicuously ignoring the extensive findings of fact that accompanied the default judgment that forms the basis for this appeal, Petitioner urges this Court to review the District Court's findings related to "a perceived difficulty, unsupported by the evidence, in serving Petitioner with the summons and complaint." *Id.* at 23.

Petitioner explains that the allegedly "erroneous findings and defective instructions made by the District Court" form the true basis for his entreaty to this Court. *Id.* He laments that the Ninth Circuit

"mistakes the nature of the present appeal," *id.* at 14, by focusing on the District Court's entry of default judgment against him. Pet. App. 2a. This admission should prove fatal to this petition. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . .").

B. Petitioner Urges The Court To Review Issues Not Decided Below

Petitioner devotes several pages of the petition to arguments challenging the sufficiency of the second service, ordered by the District Court when it set aside the original default. Pet. 11-15. Petitioner implores the Court to grant review to correct "the erroneous findings and defective instructions of the District Court" and to address "deeper and far more significant issues of due process [and] the integrity of the Hague Convention," pet. 14, 23. None of these issues was decided by the Ninth Circuit below, however, leaving no meaningful record for this Court to review. Pet. App. 2a-3a. This Court has been reluctant to review issues not decided by the courts below. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to decide "in the first instance an issue on which the trial and appellate courts did not focus").

From the outset, Petitioner asks this Court to review erroneous factual findings and issues that were not reached by the courts below. In such a case, the petition for a writ of certiorari should be denied. *Laboratory Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 132 (2006) (Breyer, J., dissenting from the dismissal of the writ of certiorari

as improvidently granted where the circuit court below "did not directly consider the question").

II. Even If This Court Wanted To Decide The Actual Question Presented, This Case Would Be A Poor Vehicle

The decision on appeal is the Ninth Circuit's dismissal of Petitioner's challenge to the District Court's entry of default judgment against Petitioner and his companies. Pet. 10. Even if this Court were to grant the petition and rule that Petitioner's appeal to the Ninth Circuit was proper procedurally, the Ninth Circuit would in all likelihood affirm the District Court's judgment. Affirmance is merited not only because the District Court correctly decided the case but on ample alternative grounds as well. Under controlling law, the Ninth Circuit "need not agree with the District Court's reasoning to affirm. [The reviewing court] may affirm on any ground finding support in the record." *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).

A. The District Court Correctly Decided That Petitioner Was Served With Process In Accordance With Controlling Law

If Petitioner's appeal had been proper under the Ninth Circuit's procedural rules, the District Court's judgment would have been affirmed because the factual findings by the District Court were not clearly erroneous and its conclusions regarding service of process on the Petitioner were in accord with controlling federal and state laws.

1. The District Court's Factual Findings Regarding Service On Petitioner Were Not Erroneous

The District Court's factual findings are reviewed for clear error. Fed. R. Civ. P. 52(a)(6); *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994). At the outset, the District Court noted that "[t]here is no dispute that Defendant Fusheng Liu is aware of the action and has been for a long time . . . ." Pet. App. 7a. Petitioner admits that he was personally served with a copy of the original complaint on behalf of his companies. Pet. 6. After Petitioner was added to the suit as a defendant by amended complaint, he acknowledges that he had notice and he appeared specially to complain that service of the amended complaint was defective. *Id.* at 7. According to the District Court, the amended complaint and summons were delivered to Petitioner's home in San Marino, California and left with Annie An, a nanny or babysitter of Petitioner's children. Pet. App. 6a. Although Petitioner was not home at the time, his wife and children were. Copies of the amended complaint and summons were mailed to the San Marino home the next day. *Id.*

The District Court properly analyzed the service of the amended complaint under the Federal Rules of Civil Procedure ("F.R.C.P."), the procedural rules of the states where the action is pending (Nevada) and where Petitioner was served (California), and controlling law. Pet. App. 8a-10a. *See* Fed. R. Civ. P. 4(e)(1). Finding that Petitioner visits his San Marino home multiple times throughout the year and that his wife and children were present in the home at the time of service and for at least a half year prior, the

District Court determined that the home is Petitioner's dwelling or usual place of abode under the F.R.C.P., the Nevada Rules of Civil Procedure ("Nevada Rules") and California's Code of Civil Procedure. Pet. App. 8a. While Petitioner may be a citizen of China, he admitted that he jointly owned the San Marino house with his wife and paid California real estate taxes. ER 00161-62, 00195. The District Court rightly noted that "a person can have more than one dwelling house or usual place of abode for purposes of the rule." Pet. App. 8a-9a (citing *Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997)). The District Court's finding that the San Marino house is Petitioner's dwelling or place of abode is buttressed by controlling law holding that "[r]ule 4 is a flexible rule that should be liberally construed so long as the party receives sufficient notice of the complaint." *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir. 1994) (quoting *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984)).

As to the second requirement for service under F.R.C.P. Rule 4(e), the District Court noted that "[n]o one disputes that Annie An was of suitable age, discretion, or competency." Pet. App. 9a. The Court therefore found this requirement of the rules satisfied. *Id.* This conclusion is supported by the declarations of Petitioner and his wife explaining that they employed Annie to care for Petitioner's older children during the time surrounding the September 2007 birth of Petitioner's son. ER 00194-200.

The District Court concluded, however, that "[t]here is no admissible evidence that Annie An resided, or was a member of the household, at the time of

service." Pet. App. 9a. Because this element of the relevant service statutes was not satisfied, the District Court found that service of the amended complaint was improper and granted Petitioner's motion to set aside the first entry of default, following the "bedrock principle that '[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, *and* brought under a court's authority, by formal process.'" *Id.* at 7a (quoting *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc,* 526 U.S. 344, 347 (1999) (emphasis added by District Court)).

Given the difficulty presented in serving Petitioner and because Petitioner already had actual notice of the proceedings, the District Court ordered that service could be affected by publication in accord with the Nevada Rules. Pet. App. 11a. The District Court also ordered Respondent to mail another copy of the amended complaint and the summons to the San Marino home. *Id.*

2. The District Court's Order For Substitute Service Was Proper Under Controlling Law

Petitioner invokes due process concerns and the specter of the Hague Convention in an attempt to elevate his squabbles over the facts of his default judgment to the level of a significant federal issue requiring this Court's intervention. Pet. 23-24. But the District Court's actions did not deprive Petitioner of his rights under the U.S. Constitution or the Hague Convention, nor will they affect the rights of other beleaguered foreign defendants, as Petitioner gravely speculates.

Petitioner accuses the District Court of attempting to circumvent the requirements of the Hague Convention when it authorized service by publication under the Nevada Rules. Pet. 23. His status as a Chinese citizen, however, does not automatically require service under the Hague Convention as implemented in F.R.C.P. 4(f). *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988) ("The only transmittal to which the [Hague] Convention applies is a transmittal abroad that is required as a necessary part of service.") Ninth Circuit law is in accord: "[t]he plain language of Rule 4(f) indicates that application of the rule is not triggered by the citizenship of the individual being served but rather by the place in which service is effected." *Stars Desert Inn Hotel*, 105 F.3d at 524. Petitioner seems to challenge the District Court's conclusion that the San Marino home was his place of abode by arguing that he is domiciled in China and therefore must be served under the Hague Convention. Pet. 9, 23. This argument misses the mark because it is well-settled that an individual "can reside in one place but be domiciled in another." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). Petitioner may be a Chinese citizen and domiciliary, but that does not preclude the District Court's conclusion that he has a second residence in the U.S. where he can be served under the rules governing domestic service.

Petitioner also challenges the District Court's prescribed substitute service, purportedly seeking to "vindicate" his due process rights under the Fourteenth Amendment. Pet. 24. Under controlling law and under all the circumstances of this case, however, the District Court's authorization of service by publication provided Petitioner with adequate due

process. Upon considering the difficulty presented in serving Petitioner and the fact that Petitioner already had actual notice of the proceedings, the District Court ordered that service could be achieved by publication under Nevada law, which Respondent carried out. Pet. App. 11a. In Nevada, service by publication is authorized "when the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or by concealment seeks to avoid service of the summons . . . ." Nev. R. Civ. P. 4(e)(1)(i).

"[A]s a legal matter, the Due Process Clause requires every method of service to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Volkswagenwerk*, 486 U.S. at 707 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). *See also Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1016-17 (9th Cir. 2002). Specifically, this Court has explained that under the Due Process Clause, "foreign nationals are assured of either personal service . . . *or substituted service* that provides" the required notice. *Volkswagenwerk*, 486 U.S. at 707 (quoting *Mullane*, 339 U.S at 314) (emphasis added).

There is no question that Petitioner had notice of the pendency of the action. Pet. App. 7a. Indeed, the District Court's order setting forth the prescribed substitute service issued in response to Petitioner's own motion to set aside the first default. Pet. 8. Thus, before being served by publication with an amended complaint he had already received, Petitioner was notified that the publication was forth-

coming in the District Court's order. Pet. App. 10a-11a. To now claim that the court-ordered service by publication was not reasonably calculated, under all the circumstances, to apprise him of the pendency of the action and afford him an opportunity to object is preposterous.

Because the factual findings and legal conclusions by the District Court regarding service of process on the Petitioner were in accord with controlling federal and state laws, Petitioner was rightly before the District Court and his default for failure to answer was proper. Even if this Court were to hold that Petitioner's appeal was proper procedurally, the Ninth Circuit would likely affirm the default judgment on the grounds decided by the District Court.

B. Ample Alternative Grounds Exist For Affirming The Default Judgment Against Petitioner

Although Petitioner tries to cast his default as a simple failure to answer a complaint that was improperly served, pet. 7-8, the facts established by the District Court and noted by the Ninth Circuit say otherwise. Sixty-five separate findings of fact and 40 conclusions of law accompanied the District Court's default judgment, providing myriad alternative bases for affirming the decision.

Default judgment was entered against Petitioner, six of Petitioner's companies[2], and his subordinate, referred to collectively as the "KXD defendants" by the District Court. Resp. App., *infra*, 3a-6a. The

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[2] According to the District Court's fact findings, Petitioner owns over 75% of the stock of the six corporate defendants. Resp. App., *infra*, 11a.

District Court found the KXD defendants willfully infringed Respondent's trademarks by selling counterfeit products in violation of the court's temporary restraining order and preliminary injunction. *Id.* at 28-29a. The District Court ruled that the KXD defendants "deliberately, systematically, and repeatedly violated this Court's orders in an attempt to hide their infringement, deceive, and defraud consumers . . . ." *Id.* at 14a. According to the District Court, Petitioner's subordinate "knowingly filed false statements under oath" and Petitioner's companies filed unsatisfactory court-ordered reports that included false statements. *Id.* at 15a-16a. Specifically regarding the Petitioner, the District Court concluded that he "directs, controls, authorizes, and is intimately involved in the companies' infringing and unlawful business activities on a daily basis." *Id.* at 11a.

Among the facts supporting its default judgment, the District Court found that Petitioner's companies "failed to produce substantial categories of documents," "destroyed . . . electronic evidence in violation of this Court's orders'" and "acted willfully and in bad faith to prevent the fair and expeditious resolution of this litigation." *Id.* at 18a-19a. In these matters, the court found that Petitioner "oversaw the actions of the other defendants." *Id.*

The District Court properly applied the law of the Ninth Circuit to determine whether default judgment was appropriate, considering the necessary factors in exercising its discretion set forth in *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Resp. App., *infra*, 22a-26a. The District Court found that despite defendants' repeated violations of the District Court's orders, multiple discovery violations, and "general contumacious behavior to the Court," an "overwhelm-

ing amount of evidence" supports the legitimacy of Respondent's claims, leaving "no doubt in the Court's mind." *Id.* at 25a. The District Court found that the defaults did not result from excusable neglect and that, despite the strong policy favoring decisions on the merits, "the Court has extended itself as far as it can to afford the KXD Defendants their fair day in court . . . ." *Id.* at 26a. The District Court concluded that "*all* the *Eitel* factors weigh in favor of granting default judgment in this instance." *Id.* (emphasis added).

Were it to review the District Court's grounds for entering default judgment, the Ninth Circuit would almost certainly affirm the decision. In fact, the Ninth Circuit has taken note of many of the facts relied on by the District Court. In a separate appeal challenging the District Court's contempt ruling against Petitioner's companies, the Ninth Circuit noted that "it became clear to the District Court that the defendants had no intention of complying with its orders." *Koninklijke Philips Electronics, N.V. v. KXD Technology, Inc. et al.*, 539 F.3d 1039, 1041 (9th Cir. 2008). Dismissing that appeal for lack of jurisdiction, the Ninth Circuit noted that "the civil sanctions were imposed as part of an ongoing litigation in which the defendants have refused to comply with the District Court's orders. If defendants' past course of conduct is any indication, additional future sanctions are likely." *Id.* at 1045. Although Petitioner was not personally a party to that appeal, the District Court had found that he is "the controlling, dominant, and driving force behind the activities of the corporate . . . Defendants and the violations of this Court's orders." Resp. App., *infra*, 11a.

Because ample alternative grounds support affirmance, this case would be a bad vehicle to decide the question presented. The petition should therefore be denied.

III. The Petition Should Be Denied Because There Is No Circuit Split Of Authority Requiring This Court's Intervention

Petitioner alleges that the Ninth Circuit's decision conflicts with the law in other circuits and that this Court's review is needed to resolve the alleged conflict. Pet. 20-22. When such a conflict is alleged, a writ of certiorari will not issue "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). *See also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). This case presents neither.

A. The Issues Involved And The Decision Below Hold Little Importance Beyond This Case

Petitioner asserts that this case involves an important question with far-reaching implications. It does not. The Ninth Circuit's decision is unpublished and therefore has limited precedential value for future litigants. This case turns on its own complicated set of facts and lengthy procedural history, making it unlikely to apply in other cases. The question presented is a minor procedural one, the resolution of which is unlikely to affect even the outcome of this case. Review by this Court is

appropriate only when lower courts differ on "the same important matter." SUP. CT. R. 10(a). The minor nature of the issue alone warrants denial of the petition.

B. The Allegedly Conflicting Decisions Demonstrate Procedural Differences Without A Distinction

Petitioner alleges that the Ninth Circuit's decision conflicts with current case law in other circuits in a way that demands this Court's resolution. Pet. 22. At most, however, the three decisions relied upon by Petitioner indicate that other courts have followed slightly different procedures for challenging default judgments. Despite following different procedural paths, the end results in these cases are essentially the same as that reached by the Ninth Circuit. Indeed, many other courts, even those in the allegedly conflicting circuits, have followed the same procedural rules as the Ninth Circuit did below.[3] Petitioner presents no evidence that, given the same set of facts, different circuit courts would decide any important legal issue differently. Because no real conflict of authority exists, the petition should be denied. *Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (noting that a main reason "justifying a denial of certiorari is the absence of a direct conflict among the Circuits").

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[3] *See, e.g., Golmon v. Latham*, 643 S.E.2d 625, 626 (N.C. App. 2007) ("The requirement that a party first seek relief from a default judgment in the trial is in accord with the rule followed by the majority of jurisdictions."); *Maust v. Estate of Blair*, 859 N.E.2d 778, 783 (Ind. Ct. App. 2007); *Levy v. Blue Cross & Blue Shield of Greater N.Y.*, 124 A.D.2d 900, 901 (N.Y.S. 1986); *Winesett v. Winesett*, 338 S.E.2d 340, 341 (S.C. 1985).

In one case relied upon by Petitioner, the Seventh Circuit discussed Rule 55(c) not to decide a point of law but simply to clarify a party's misunderstanding of the difference between relief from the entry of default and relief from default judgment. *United States v. Sang Woo Kim*, 242 F. App'x 355, 357 (7th Cir. 2007). Although the Seventh Circuit considered the defendant's appeal of his default judgment even though he had not filed a formal motion to set it aside, the court ultimately remanded the case "to allow the District Court to address whether the entry of default should be set aside pursuant to Fed. R. Civ. P. 55(c)." *Id.* at 358. In doing so, the Seventh Circuit relied upon a First Circuit decision for the proposition that the "question of whether entry of default should be set aside 'is more appropriately resolved by the district court in the first instance on remand.'" *Id.* at 358-359 (quoting *Key Bank v. Tablecloth Textile Co.*, 74 F.3d 349, 355-56 (1st Cir. 1996)). Though its process may have been slightly different from that followed by the Ninth Circuit below, the Seventh Circuit's result was the same.

A second case cited by Petitioner underscores the procedural, rather than substantive, nature of the issues involved. "Rule 60(b) . . . does not provide substantive law. Rather, Rule 60(b) defines the procedure for analyzing motions for relief from judgment." *Ackra Direct Marketing Corp. v. Fingerhut Corp.* 86 F.3d 852, 856 (8th Cir. 1996). Although the Eighth Circuit did not require the defendant to file a formal motion to set aside the default judgment before appealing, the court noted that the defendant had already presented his arguments to the District Court in a different form, as objections to the magistrate judge's report recommending entry of default judgment. *Id.* at 855 n.3. This represents yet

another procedural variation that achieves the same result as the other courts' decisions: consideration of a defendant's challenge to a default judgment by the District Court in the first instance.

Petitioner tries to liken his case to that of the defendant in *Ackra Direct Marketing*, implying that if he had filed a motion to set aside the default judgment, his arguments would have been duplicative of the arguments in his previous motion that led to the District Court's February 2008 order setting aside the first default. Pet. 12-13. However, three of Petitioner's four arguments on appeal were never presented to the District Court at the first hearing--or at all. To the Ninth Circuit, Petitioner argued for the first time that the service directed by the District Court's February 2008 order was not permitted under the Federal Rules, that the court-ordered substitute service violated the Due Process Clause, and that the court-ordered substitute service violated both Nevada law and California law. Pet. 10. Petitioner neither objected to the terms of the February 2008 order at the time nor filed any motion in the District Court to take issue with that order at all, much less to test out the arguments it now presents to this Court. By his own admission, Petitioner did not answer the process served pursuant to the February 2008 order, did not oppose Respondent's second motion for default, did not move to set aside the default under F.R.C.P. 55(c), did not oppose Respondent's motion for default judgment, did not appear at the hearing on the default judgment damages, and did not move to set aside the default judgment under F.R.C.P. 60(b). Pet. 8-9. Given his deliberate silence following the District Court's February 2008 order, Petitioner's conduct demonstrates a conscious choice to gamble on making no argument at all, rather than any wish to

avoid allegedly "duplicative" arguments to the District Court.

Petitioner's case does, however, share some similarities with *Ackra Direct Marketing*. The Eighth Circuit's decision in that case supports affirming Petitioner's default even if he had followed the well-established procedures for seeking to set aside the default. The Eighth Circuit affirmed the default judgment entered by the District Court in *Ackra Direct Marketing* where the defendant "failed to comply with the court's orders," "ignored the final pretrial/settlement conference requirements," and "delayed the discovery process by submitting late and incomplete discovery answers and by failing to produce some discovery altogether." *Id.* at 854-855. The District Court below found Petitioner guilty of similar infractions, and many others. Resp. App., *infra*, 14a-19a. It is therefore likely that any reviewing court would affirm Petitioner's default judgment like the Eighth Circuit did in *Ackra Direct Marketing*, regardless of the review procedures followed.

The third case relied upon by Petitioner confirms the procedural variations possible in challenging a default judgment. "Typically, upon entry of a default judgment, defendants will move before the District Court to vacate the default judgment under Federal Rules of Civil Procedure 55(c) and 60(b)." *Pecarsky v. Galaxiworld.com*, 249 F.3d 167, 170 (2nd Cir. 2001). Nonetheless, the Second Circuit allowed an appeal where a formal motion to set aside the default judgment had not been filed, noting, "[a]t the outset, it is important to note the slightly unusual procedural history of this case." *Id.* In fact, it would have been moot to require the corporate defendant to file a formal motion in the District Court because its

counsel withdrew and "[a]s a corporation, Galaxiworld, could only appear with counsel." *Id.* at 172. While struggling to find new counsel, the defendants "were in constant contact with the district court . . . ." *Id.* They "were not ignoring the court's orders; instead, they made repeated efforts to inform the court of their difficulties in finding new counsel." *Id.* Nonetheless, the District Court entered default judgment and the Second Circuit subsequently allowed the appeal, reversing the default judgment and remanding this "unusual" case to the District Court. *Id.* at 172, 175.

In other, less unusual cases, the Second Circuit has followed the same procedure as the Ninth Circuit did here, dismissing the appeal of a defendant who "appealed without first moving to set aside the default judgment against him in the district court pursuant to Fed. R. Civ. P. Rules 55(c) and 60(b)." *United States v. Tucker*, 5 F. App'x 23, 23-24 (2nd Cir. 2001). Because Tucker had not presented his arguments in a motion to the District Court first, the Second Circuit was "in no position to make a ruling on the merits of Tucker's appeal without a record compiled during the course of such a proceeding on which to base it." *Id.* at 24.

The procedural process for challenging a default judgment may vary among courts faced with different factual situations, but even Petitioner's own authority reveals that these differences have little substantive impact. Because the petition presents neither a "real and embarrassing" conflict of legal authorities nor an issue of broad applicability or importance, it should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN H. MORRISSETT
Counsel of Record
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.
3300 Hillview Avenue
Palo Alto, California 94304
(650) 849-6600

ERIKA H. ARNER
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.
Two Freedom Square
11955 Freedom Drive
Reston, Virginia 20190
(571) 203-2700

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 07/02/08]

Case No.: 2:05-cv-01532-RLH-GWF
Case No.: 2:06-cv-00101-RLH-GWF

KONINKLIJKE PHILIPS ELECTRONICS N.V., a Netherlands Corporation,
Plaintiff,

vs.

KXD TECHNOLOGY, INC.; ASTAR ELECTRONICS, INC.; ASTAR ELECTRONICS USA, INC.; SHENZHEN KXD MULTIMEDIA CO., LTD.; SHENZHEN KAIXINDA ELECTRONICS CO., LTD.; KXD DIGITAL ENTERTAINMENT, LTD.; JINGYI LUO, a/k/a JAMES LUO; FUSHENG LIU, a/k/a LIU FUSHENG, a/k/a FU SHENG LIU; SUNGALE GROUP, INC.; SUNGALE ELECTRONICS (SHENZHEN), LTD.; AMOI ELECTRONICS, INC.; AMOI ELECTRONICS CO., LTD.; AMOI ELECTRONICS, LTD.; CHINA ELECTRONICS CORPORATION; AMOISONIC ELECTRONICS, INC.; INTERNATIONAL NORCENT TECHNOLOGY, INC.; NORCENT HOLDINGS, INC.; SHANGHAI HONGSHENG TECHNOLOGY CO., LTD.; SHENZHEN NEWLAND ELECTRONIC INDUSTRY CO., LTD.; DESAY A&V (USA), INC.; DESAY A&V SCIENCE & TECHNOLOGY CO., LTD.; DESAY HOLDINGS CO., LTD.; XORO ELECTRONICS (SHANGHAI), LTD.; SHENZHEN XORO ELECTRONICS CO., LTD.; MAS ELEKTRONIK AG CORPORATION; SHENZHEN ORIENTAL DIGITAL TECHNOLOGY CO., LTD.; and JOHN DOES 1 THROUGH 20,
Defendants.

JUDGMENT

Before the Court is Plaintiff's Motion for Default Judgment Against Defendants KXD Technology, Inc., Astar Electronics, Inc., Astar Electronics USA, Inc., Shenzhen KXD Mutlimedia Co., Ltd., Shenzhen Kaixinda Electronics Co., Ltd., KXD Digital Entertainment, Ltd., Jingyi Luo a/k/a James Luo, and Fusheng Liu a/k/a Liu Fusheng a/k/a Fu Sheng Liu (#821), filed January 25, 2008. The Court has also considered Defendants Astar Electronics, Inc., Shenzhen Kaixinda Electronics Co., Ltd., Shenzhen KXD Multimedia Co., Ltd., KXD Digital Entertainment, Ltd., and Jingyi Luo, a/k/a. James Luo's Opposition (##828–829), filed February 12, 2008, and Plaintiff's Reply (#831) and Memorandum (#832), filed February 26, 2008.

Also before the Court is Plaintiff's Renewed Motion for Default Judgment Against Fusheng Liu, a/k/a Liu Fusheng, a/k/a Fu Sheng Liu (#861), filed May 2, 2008. Fusheng Liu did not oppose the Renewed Motion and he will therefore be grouped with the other KXD Defendants for purposes of this Judgment Order.

The Answers to the First Amended Complaint of these Defendants were stricken and the defaults were entered on May 9, 2008. (Dkt. #868.) The defaults having been entered, the Court held a Hearing on June 11 and 12, 2008, to determine damages. Before the Hearing, the Court was informed that Defendant Jingyi Luo filed for bankruptcy and therefore this case is stayed as to him. However, having considered fully the evidence presented, the Court finds that Judgment is justified for Plaintiff as to all other Defendants mentioned herein: Astar Electronics, Inc., Shenzhen Kaixinda Electronics Co., Ltd., Shenzhen KXD Multimedia Co., Ltd., KXD Digital Entertain-

ment, Ltd., and Fusheng Liu, a/k/a Liu Fusheng, a/k/a Fu Sheng Liu (hereinafter "KXD Defendants").

Pursuant to the Findings of Fact, Conclusions of Law, and Decision entered herein, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Judgment be entered against the KXD Defendants as follows:

(1) Judgment is for (1) federal trademark infringement and counterfeiting (15 U.S.C. § 1114(1)); (2) federal unfair competition and false designation of origin (15 U.S.C. § 1125(a)); (3) federal trademark dilution (15 U.S.C. § 1125(c)); (4) deceptive trade practices (Nev. Rev. Stat. § 598.0915); and (5) common law trademark infringement and unfair competition.

(2) The KXD Defendants and their agents, servants, employees, representatives, successors, assigns, whether they be persons, firms, or corporations, are hereby permanently enjoined and restrained from directly or indirectly:

(a) utilizing the Philips DVD+ReWritable & Design trademark, any other mark owned by Philips, or any mark which is substantially similar to the Philips Trademarks, including those marks which are registered with the United States Patent & Trademark Office (hereinafter the "Philips Trademarks") in any infringing manner including generally, but not limited to, manufacturing (or causing to be manufactured), importing, marketing, advertising, selling, offering to sell, distributing, and otherwise exploiting any

merchandise which infringes said Philips Trademarks;

(b) using any simulation, reproduction, counterfeit, copy, or colorable imitation of the Philips Trademarks in connection with the promotion, advertisement, display, sale, offering for sale, manufacture, production, circulation, or distribution of any unauthorized products in such fashion as to relate or connect, or tend to relate or connect, such products in any way to Philips, or to any goods sold, manufactured, sponsored, approved by, or connected with Philips;

(c) engaging in any conduct that tends to falsely represent, or is likely to confuse, mislead, or deceive purchasers, the KXD Defendants' customers, and/or members of the public into believing, that the actions of the KXD Defendants, the products sold by the KXD Defendants, or the KXD Defendants themselves are connected with Philips, are sponsored, approved, or licensed by Philips, or are in any way connected or affiliated with Philips;

(d) affixing, applying, annexing, or using in connection with the importation, manufacture, distribution, advertising, sale, and/or offering for sale of any goods or services, a false description or representation, including words or other symbols tending to falsely describe or represent such goods as being those of Philips;

(e) infringing the aforementioned Philips Trademarks, and damaging Plaintiff's goodwill, reputation, and business;

(f) using or continuing to use the Philips Trademarks or trade names or any variation thereof in any manner which infringes or tends falsely to represent sponsorship, association, or approval by Philips such as on the Internet (either in the text of websites, as a domain name, or as a key word, search word, metatag, or any part of the description of the site in any submission for registration of any Internet site with a search engine or index) in connection with any goods or services not directly authorized by Philips;

(g) secreting, destroying, altering, removing, or otherwise dealing with the unauthorized products or any books of records which contain any information relating to the importing, manufacturing, producing, distributing, circulating, selling, marketing, offering for sale, advertising, promoting, or displaying of all unauthorized products which infringe the Philips Trademarks; and

(h) effecting assignments or transfers of money, real or personal property, business licenses, forming new entities or associations or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions or restrictions set forth in paragraphs (a)–(g), above;

The prohibitions set forth in paragraphs (a)–(h), above, do not enjoin the KXD Defendants or any related entities from engaging in comparative advertising, classic or nominative fair use, or other protected First Amendment activities to which the KXD Defendants are entitled under the Constitution of the United States.

(3) The KXD Defendants are jointly and severally liable, and shall pay Philips compensatory treble damages in the amount of $112,152,659.40 based upon the KXD Defendants' willful infringement and profits for sales of Counterfeit Products.

(4) The KXD Defendants are jointly and severally liable, and shall pay Philips punitive damages in the amount of $5,000,000.00.

(5) The Judgment is entered against fewer than all of the parties to this action; the Court expressly determines there is no just reason for delay for entering this Judgment pursuant to Federal Rules of Civil Procedure 54(b) and the Court directs entry of this Judgment against Defendants Astar Electronics, Inc., Shenzhen Kaixinda Electronics Co., Ltd., Shenzhen KXD Multimedia Co., Ltd., KXD Digital Entertainment, Ltd., and Fusheng Liu, a/k/a Liu Fusheng, a/k/a Fu Sheng Liu.

Dated: July 1, 2008.

/s/ ROGER L. HUNT
ROGER L. HUNT
Chief United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 07/02/08]

Case No.: 2:05-cv-01532-RLH-GWF
Case No.: 2:06-cv-00101-RLH-GWF

KONINKLIJKE PHILIPS ELECTRONICS N.V., a Netherlands Corporation,

Plaintiff,

vs.

KXD TECHNOLOGY, INC.; ASTAR ELECTRONICS, INC.; ASTAR ELECTRONICS USA, INC.; SHENZHEN KXD MULTIMEDIA CO., LTD.; SHENZHEN KAIXINDA ELECTRONICS CO., LTD.; KXD DIGITAL ENTERTAINMENT, LTD.; JINGYI LUO, a/k/a JAMES LUO; FUSHENG LIU, a/k/a LIU FUSHENG, a/k/a FU SHENG LIU; SUNGALE GROUP, INC.; SUNGALE ELECTRONICS (SHENZHEN), LTD.; AMOI ELECTRONICS, INC.; AMOI ELECTRONICS CO., LTD.; AMOI ELECTRONICS, LTD.; CHINA ELECTRONICS CORPORATION; AMOISONIC ELECTRONICS, INC.; INTERNATIONAL NORCENT TECHNOLOGY, INC.; NORCENT HOLDINGS, INC.; SHANGHAI HONGSHENG TECHNOLOGY CO., LTD.; SHENZHEN NEWLAND ELECTRONIC INDUSTRY CO., LTD.; DESAY A&V (USA), INC.; DESAY A&V SCIENCE & TECHNOLOGY CO., LTD.; DESAY HOLDINGS CO., LTD.; XORO ELECTRONICS (SHANGHAI), LTD.; SHENZHEN XORO ELECTRONICS CO., LTD.; MAS ELEKTRONIK AG CORPORATION; SHENZHEN ORIENTAL DIGITAL TECHNOLOGY CO., LTD.; and JOHN DOES 1 THROUGH 20,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, and DECISION

This matter, having come before the Court on Koninklijke Philips Electronics N.V.'s ("Philips") Motions for: (1) Default Judgment (Dkt. #821) Against Defendants KXD Technology, Inc., Astar Electronics, Inc., Shenzhen KXD Multimedia Co., Ltd., Shenzhen Kaixinda Electronics Co., Ltd., KXD Digital Entertainment, Ltd., Astar Electronics USA, Inc., Fusheng Liu a/k/a Liu Fusheng, a/k/a Fu Sheng Liu (collectively "KXD Defendants") and Jingyi Luo, a/k/a Jimmy Luo, filed January 25, 2008 ("KXD Default Judgment Motion"); and (2) Renewed Default Judgment (Dkt. #861) against Fusheng filed May 2, 2008 ("Renewed Fusheng Default Judgment Motion"). The defaults having been entered as to all these Defendants, the Court held a Hearing on June 11 and 12, 2008, to determine the amount of damages. Before the Hearing, the Court was informed that Defendant Jingyi Luo filed for bankruptcy and therefore this case is stayed as to him. However, the Court having considered the papers submitted in support of and in opposition to Philips' KXD Default Judgment Motion and Renewed Fusheng Default Judgment Motion, the evidence presented at hearings, other relevant pleadings in this matter, and the arguments of counsel, now makes the following ruling:

FINDINGS OF FACT

A. Philips and the DVD+ReWritable & Design Trademark

1. Philips is a Netherlands Corporation having an office and place of business in Amsterdam, Netherlands.

2. Philips, along with other corporations, contributed to the development of digital video (or versatile) disc ("DVD") recorders and recordable disks. Philips is the exclusive owner, by assignment, of the DVD+ReWritable & Design trademark, which was registered to Sony Kabushiki Aisha Corporation ("Sony") on August 20, 2002, on the Principal Register of the United States Patent and Trademark Office, Reg. No. 2,610,036. The DVD+ReWritable & Design trademark is associated with and used on the following goods: blank magneto-optical discs; prerecorded magneto-optical discs featuring music, musical data, motion pictures, photographs and computer programs designed to simplify the use of computers; magneto-optical/optical/magnetic disc drives; and computers. These goods include DVD+R/+RW recorders, DVD+R/+RW computer drives (both internal and external) and DVD+RW discs.

B. The KXD Defendants

3. KXD Technology, Inc. ("KXD Technology") is a corporation organized and existing under the laws of California, with an office and principal place of business at 5101 Commerce Drive, Baldwin Park, California, 91706.

4. Astar Electronics, Inc. ("Astar") is a corporation organized and existing under the laws of California, with an office and principal place of business at 5101 Commerce Drive, Baldwin Park, California, 91706.

5. Astar Electronics USA, Inc. ("Astar USA") is a corporation organized and existing under the laws of California, with an office and principal place of business at 5101 Commerce Drive, Baldwin Park, California, 91706.

6. Shenzhen KXD Multimedia Co., Ltd., ("KXD Multimedia") is an entity organized and existing under the laws of the People's Republic of China, with places of business at 34/37/38F Development Center Building, Renmin (S) Road, Louho District, Shenzhen, Guandong 518108, China, and at 5101 Commerce Drive, Baldwin Park, California, 91706.

7. Shenzhen Kaixinda Electronics Co., Ltd., ("Kaixinda") is an entity organized and existing under the laws of the People's Republic of China, with an office and principal place of business at Unit E, F, 3F No. 210 Block Tairan Industry, Chengongmiao, Shenzen, Guangdong, China.

8. KXD Digital Entertainment, Ltd. ("KXD Digital"), which was formerly known as KXD Digital Entertainment Pte. Ltd., which was formerly known as KX Electronics Pte., Ltd., is an entity organized and existing under the laws of Singapore, with an office and principal place of business at Renmin Road, Shenzen 518001, China.

9. KXD Digital owns and operates KXD Technology, Astar, Astar USA, KXD Multimedia, and Kaixinda.

10. Jingy Luo, also known as James Luo ("Luo"), is an individual, who at all relevant times had a regular place of business at 5101 Commerce Drive, Baldwin Park, Califonia, 91706.

11. Luo is the Executive Vice President and registered agent for service of process for KXD Technology and has also represented that he is the president of KXD Technology when KXD Technology filed for bankruptcy. Luo is also the president of Astar and Astar USA.

12. Fusheng Liu, also known as Liu Fusheng and Fu Sheng Liu ("Fusheng"), is an individual, having a regular place of business at 5101 Commerce Drive, Baldwin Park, California, 91706.

13. Fusheng holds title to residential property located at 1825 Carlisle Drive, San Marino, CA 91108, with his wife, Qin Zhou, which is the same address used on a Fictitious Business Name Statement signed by Fusheng and Luo for KXD Technology and Astar.

14. Fusheng owns 402,196,730 of 531,391,800 shares of the corporate the KXD Defendants and their subsidiaries' stock, or 75.687%.

15. KXD Digital, KXD Technology, Astar, Astar USA, KXD Multimedia, Kaixinda, Luo, and Fusheng are all related to each other and are each the knowing agent, servant, and representative of each other and acting in the scope of his/its agency.

16. Fusheng directs, controls, authorizes, and is intimately involved in the companies' infringing and unlawful business activities on a daily basis.

17. Fusheng, by design, has left KXD Technology, Astar, and Astar USA undercapitalized so that KXD Technology, Astar, and Astar USA would be unable to fully respond to damages for their infringing conduct.

18. Fusheng is the controlling, dominant, and driving force behind the activities of the corporate the KXD Defendants and violations of this Court's orders.

C. The KXD Defendants' Infringing Acts Before The First Amended Complaint

19. Philips had information that the KXD Defendants would exhibit, display, and/or distribute advertisements, brochures, booklets, pamphlets, fliers, and

other types of promotional materials in which the KXD Defendants depicted products, merchandise, and/or articles of goods bearing the DVD+ReWritable & Design trademark without Philips' consent ("Counterfeit Products") and would exhibit and offer for sale certain Counterfeit Products at the 2006 Consumer Electronics Show ("CES") in Las Vegas, Nevada. The introduction of these Counterfeit Products harms Philips, Philips' licensees, and the attendees of the CES by creating confusion that the Counterfeit Products are genuine and thereby creating an environment of unfair competition.

20. Philips sent letters, dated December 14, 2005, to KXD Multimedia and Kaixinda demanding that they not display or offer for sale any Counterfeit Products at the 2006 CES and that they cease and desist counterfeiting of Philips' DVD+ReWritable & Design mark.

21. The KXD Defendants were on actual notice that Philips is the owner of the DVD+ReWritable & Design trademark and that the KXD Defendants' manufacture, distribution, offering for sale, and/or sale of unlicensed product bearing the DVD+ReWritable & Design trademark is a violation of federal law. Despite such notice, the KXD Defendants exhibited and offered for sale Counterfeit Products at the 2006 CES event.

D. History

22. On January 5, 2006, the Court issued an amended temporary restraining order ("TRO") and seizure order to protect Philips' DVD+ReWritable & Design mark.

23. The TRO prevented the KXD Defendants, and all persons and entities in participation with the KXD Defendants who received actual notice of the order, from assisting or inducing, directly, or indirectly the following activities: "Manufacturing, importing, exporting, distributing, shipping, introducing into commerce, offering for sale, selling, returning, disposing of, packaging, re-packaging, marketing, or supplying any goods that bear, embody, display, or affix the DVD+ReWritable & Design mark." (Dkt. #39.)

24. The U.S. Marshals were present to help enforce the TRO at the 2006 CES.

25. Although KXD Technology, Astar, KXD Multimedia, Kaixinda, KXD Digital and Luo had been displaying Counterfeit Products earlier that day, when the U.S. Marshals Service returned to the KXD Defendants' booth, Luo, in the presence of his superior, Fusheng, represented that the KXD Defendants had no such products at CES. Therefore, the U.S. Marshals Service was forced to search for Counterfeit Products and found the Counterfeit Products that had been displayed earlier that day hidden in cabinets.

26. On March 15, 2006, the Court issued a preliminary injunction enjoining the same conduct prohibited by the TRO and ordered each of the KXD Defendants to file sworn reports ("Compliance Reports") "setting forth in detail the manner and form in which the compliance with [the preliminary injunction] was made." (Dkt. #252.)

27. The preliminary injunction required that each Defendant should "provide the Court and Philips' counsel with a report setting forth an inventory containing the identity and amount of items recalled no later than thirty (30) calendar days" ("Recall Reports"). (*Id.*)

E. Evidence of Willful Infringement, Intent to Deceive, and Intent to Fraud

28. The KXD Defendants intended to adopt Philips' mark to confuse purchasers into believing their Counterfeit Products were genuine.

29. The KXD Defendants have deliberately, systematically, and repeatedly violated this Court's orders in an attempt to hide their infringement, deceive, and defraud consumers:

- The KXD Defendants have never filed or served Recall Reports.
- The KXD Defendants have never filed or served satisfactory Compliance Reports.
- Between the date the TRO was entered and October 11, 2006, the KXD Defendants sold as many as 27,300 units of Counterfeit Products.
- During the summer and fall of 2006, the KXD Defendants sold and shipped Counterfeit Products at least five additional times.
- On March 20, 2006, the KXD Defendants filed a belated Compliance Report, falsely asserting under oath that each and every one of the KXD Defendants were in compliance with the TRO and had ceased selling any Counterfeit Products.

30. On September 26, 2006, and then again on December 15, 2006, in direct and willful violation of the Court's preliminary injunction, the KXD Defendants shipped infringing products, including DVD-R 1100s, which are Counterfeit Products, as well as other DVD products, to Coby Electronics Corp., which was not licensed to use Philip's DVD+ReWritable &

Design mark on any goods. The KXD Defendants also sold and shipped to Coby Manufacturing Co., Ltd./ Coby Electronics Corp. (collectively, "Coby") DVD-R 1300s, which are Counterfeit Products marketed and sold in the United States by Coby Electronics Corp.

31. In 2006, the KXD Defendants sold and KXD/ Nready Netware Ltd. ("Nready") shipped cartons of electronic products, including DRM-2001G's, which are Counterfeit Products, to Peters Consumer Brands, LLC ("Peters") and to Polaroid Consumer Electronics, LLC. ("Polaroid"). Neither Polaroid nor Peters are licensed to use Philips' DVD+ReWritable & Design mark on any goods.

32. As this Court found previously, the KXD Defendants violated the preliminary injunction and attempted to fraudulently conceal their infringement by using third parties, namely Nready, Polaroid, and Coby, to cause Counterfeit Products to be shipped into the United States.

33. The KXD Defendants have made numerous sales and shipments of Counterfeit Products in direct and willful violation of the Court's preliminary injunction.

34. Luo, on behalf of the KXD Defendants, knowingly filed false statements under oath claiming that the KXD Defendants were in compliance with the TRO and preliminary injunction when they were not in compliance.

35. Luo, on behalf of the KXD Defendants, authorized, ratified, and directed rebates and incentives to sell Counterfeit Products after he was served with notice of the TRO and the preliminary injunction.

36. On March 20, 2007, the KXD Defendants each filed unsatisfactory Compliance Reports which failed

to set forth in detail the manner and form in which the compliance with the preliminary injunction was made, and also included false statements.

37. The KXD Defendants claimed in their false reports that they were not manufacturing, importing, exporting, distributing, shipping, introducing into commerce, offering for sale, selling, returning, disposing of, packaging, re-packaging, marketing, advertising, or supplying any goods that bear, embody, display, or affix the DVD+ReWritable & Design mark.

38. Luo also falsely assured the Court under penalty of perjury that he, Astar, and KXD Technology were complying with the TRO, when in fact, Luo expressly authorized and/or ratified most, if not all, of the business transactions in violation of the TRO.

39. Despite the KXD Defendants' declarations, and having been served with the Civil Contempt Order, the KXD Defendants still displayed and advertised Counterfeit Products on at least one of their websites, www.astarelectronics.com, until as late as April 5, 2007. The KXD Defendants also provided manuals for the Counterfeit Products on their websites.

40. The KXD Defendants committed multiple violations of the Court's preliminary injunction by continuing to ship and sell Counterfeit Products into the United States either using straw men or shipping the Counterfeit Products directly.

41. The KXD Defendants' general counsel represented to the Court that the KXD Defendants would take a highly pro-active approach to monitoring full and complete compliance with the Court's orders. Nonetheless, the KXD Defendants continued to violate the Court's orders and attempted to hide their infringement.

F. The KXD Defendants' History of Hiding Assets, Evidence of Substantial Income

42. LG, a corporation operated and controlled by Luo, Fusheng, and Fusheng's wife Qin Zhou ("Zhou"), was created on May 26, 2006, after this litigation commenced.

43. Zhou is the Chief Executive Officer, Chief Financial Officer, President, Secretary, founder, and registered agent of LG.

44. LG's business address, 4906 Bleeker Street, Baldwin Park, CA 91706, is the same address that Astar leased for KXD employees.

45. LG's website is Lgnorth.com, and Luo is the administrative contact for Lgnorth.com.

46. Zhou filed a fictitious name certificate listing LG as the "Registrant/Corporation/ Limited Liability Company" for the following fictitious business names: "Samsung Electronics," and "NEC Electronics." These businesses are not the well-known electronics companies which use the Samsung, NEC, and LG marks, but rather are clear attempts by the KXD Defendants to confuse, deceive, and to bring about fraud on consumers or U.S. Customs and Border Patrol.

47. Zhou also filed fictitious name certificates listing herself as the "Registrant/Corporation/ Limited Liability Company" for the following fictitious business names: "Astar Electronic," "Astar Electron," and "Astar Elect."

48. From February 12, 2007, through August 2007, the KXD Defendants transferred to LG at least $25,918,556.04.

49. On March 17, 2007, KXD Technology transferred $3,000,000.00 to Qin Zhou.

50. On August 15, 2007, KXD Technology, Inc., filed for chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Central District of California. On August 20, 2007, the automatic stay in bankruptcy was modified to allow this action to proceed.

G. Magistrate Judge Foley's Report and Recommendation

51. Magistrate Judge Foley issued a Recommendation and Order to Show Cause Why the KXD Defendants Should Not Be Found in Contempt ("R&R") finding that the KXD Defendants violated numerous Court orders and rules and that their Answers should be stricken. The R&R did not address Fusheng because he had not yet been formally named as a Defendant.

52. The Court adopted the R&R on October 16, 2007, and found that the KXD Defendants failed to produce substantial categories of documents, separate and apart from the seized documents, that the KXD Defendants had been ordered to produce, including financial records, attorney-client and attorney work-product documents as to which the Court held that the KXD Defendants waived their privilege objections, advertising, inventory documents and e-mail correspondence, and that the KXD Defendants (except Fusheng, though he oversaw the actions of the other KXD Defendants) had destroyed a electronic evidence in violation of this Court's orders. The KXD Defendants also did not produce a relevant witness for a noticed deposition.

53. The KXD Defendants acted willfully and in bad faith to prevent the fair and expeditious resolution of this litigation. The KXD Defendants have prevented

completion of discovery within the extended discovery period.

H. The KXD Defendants' Defaults

54. On September 27, 2007, Philips filed its First Amended Complaint ("FAC") to add Fusheng and Astar USA as Defendants.

55. On October 9, 2007, KXD Technology, Astar, KXD Multimedia, Kaixinda, KXD Digital, and Luo ("the Original KXD Defendants") filed an Answer to the FAC.

56. On October 16, 2007, the Court struck the Answers of the Original KXD Defendants and ordered that their defaults be entered. On May 9, 2008, the Court struck the KXD Defendants' Answers to the FAC and affirmed that the defaults were properly entered for the KXD Defendants' contumacious conduct consisting of discovery delay and obstruction directed at preventing Plaintiff from obtaining relevant evidence to prove its claims.

57. The Clerk entered default against Fusheng on April 10, 2008, because he failed to answer the FAC after being properly served.

58. Through the entries of default against Fusheng, Astar USA, and the Original KXD Defendants, the defaults of all of the KXD Defendants have been entered.

I. Philips' Damages, Attorney Fees, and Costs Incurred by KXD's Infringing Activity and Contemptuous Conduct

59. At the Hearing on June 11, 2008, the Court heard the testimony of Plaintiff's expert witness Mr. Michael J. Wallace ("Mr. Wallace"). Mr. Wallace

reviewed documents and information produced by and seized from the KXD Defendants, including documents concerning gross revenues, bills of lading, and other importation information provided by Philips' counsel.

60. Based upon Mr. Wallace's independent expert review of the documents which were available to him, he concluded that it is clear that the KXD Defendants have not produced complete records of their revenue or unit sales of the Counterfeit Products.

61. The evidence did show that at a minimum, the following Counterfeit Products were sold by the KXD Defendants:

- 21,375 units of the infringing DVR-2100 product for gross revenues of $2,258,001;
- 32,280 units of the infringing DRM-2001G product for gross revenues of $5,180,212;
- 1,519 units of the infringing DVDR-1100 product for gross revenues of $183,510.

These sales total $7,621,723.00.

62. In addition to the sales set forth in the preceding paragraph, the KXD Defendants have imported into this country at least 76,048 cartons of goods described as containing Counterfeit Products. Shipments of Counterfeit Products contained four units per carton, except that the cartons containing the DRM-2001 G contained only one unit per carton. The following infringing Counterfeit Products were imported:

- DVR-2100: 1,874 cartons x 4 units per carton = 7,490 units x $111.0684 (average price of unit over multiple shipments) = $831,902.00;

- DRM-2001G: 22,280 units x $157.9718 (average price of unit over multiple shipments) = $3,519,612.00;
- DVDR-1100: 32,754 cartons x 4 units per carton = 131,016 units x $120.80 per unit = $15,826,732.80;
- DVDR-1300: 10,050 cartons x 4 units per carton = 40,200 units x $100.00 per unit = $4,020,000.00;
- Other Recorders: 9,090 cartons x 4 units per carton = 36,360 units x $90.00 per unit = $3,272,400.00. These imported Counterfeit Products total $27,470,646.80.

63. In addition to the sales set forth in the preceding two paragraphs, the KXD Defendants recently produced three purchase orders in 2008, that they previously failed to produce, for the following amounts: $1,630,000.00, $350,000.00, and $311,850.00. These purchase orders total $2,291,850.00.

64. The KXD Defendants' sales were at least $7,621,723.00 plus $27,470,646.80 plus $2,291,850.00 for total sales of $37,384,219.80.

65. Philips incurred attorney fees and costs, which include investigative costs and expenses incurred in guarding, inventorying, securing, and storing the documentary evidence. However, the form in which the fees and costs were documented was not acceptable to the Court. Therefore, at the Hearing, the Court granted Plaintiff leave to re-submit documentation in this regard and also granted leave for the KXD Defendants to respond to the new submission.

CONCLUSIONS OF LAW:

A. Jurisdiction

66. This Court has original subject matter jurisdiction over the claims in this action that relate to trademark, counterfeiting, infringement, dilution, false designation of origin, and false description pursuant to the provisions of sections 34(a) and 39 of the Lanham Act, 15 U.S.C. §§ 1116(a), 1112(a), and 28 U.S.C. §§ 1331, 1338(a), and 1338(b). This Court has supplemental jurisdiction over the claims which arise under state statutory and common law pursuant to 28 U.S.C. § 1367(a) because the state law claims are so related to the federal law claims that they form part of the same case or controversy and derive from a common nucleus of operative facts. Venue properly lies in this district under 28 U.S.C. §§ 1391 (b) and (d).

B. Philips Has Complied with Fed. R. Civ. P. 55(a) and Fed. R. Civ. P. 54(c)

67. Entry of default judgment is governed by Fed. R. Civ. P. 55. Philips has satisfied the procedural requirements for default judgment pursuant to Fed. R. Civ. P. 55(a) and Fed. R. Civ. P. 54(c).

68. Each of the KXD Defendants' defaults were properly entered.

69. Because Philips does not request relief that differs from or exceeds that prayed for in the FAC, the application for default judgment complies with Fed. R. Civ. P. 54(c). *See Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003).

70. The Ninth Circuit holds that a district court may consider the following factors [the "Eitel factors"] in exercising its discretion to award a default judgment:

> (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action[,] (5) the possibility of a dispute concerning material facts[,] (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

i. Philips Would Suffer Prejudice if the Default Judgments are Not Granted

71. This *Eitel* factor considers whether Plaintiff will suffer prejudice if the Court does not enter default judgment against the Defendant. *See PepsiCo., Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). The Court finds that if it does not enter default judgment, Plaintiff would be without other recourse for recovery and thus will suffer prejudice through the loss of sales and diminution of good will.

ii. Philips Properly Pled the Elements for Each Cause of Action

72. The next two *Eitel* factors require a plaintiff to state a claim on which the plaintiff may recover. *Philip Morris* USA, 219 F.R.D. at 499 (citation omitted).

73. A defendant's liability is deemed established upon default, and all findings of facts necessary to support liability are accepted as true. *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990); see also *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977) ("The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.")

74. In this case, Philips has adequately pled all of the following claims against the KXD Defendants: (1) federal trademark infringement and counterfeiting (15 U.S.C. § 1114(1)); (2) federal unfair competition and false designation of origin (15 U.S.C. § 1125(a)); (3) federal trademark dilution (15 U.S.C. § 1125(c)); (4) deceptive trade practices (N.R.S. § 598.0915); and, (5) common law trademark infringement and unfair competition.

75. Plaintiff has alleged and shown that it is the exclusive owner of the DVD+ReWritable & Design mark, that the KXD Defendants knew Philips was the exclusive owner, that the KXD Defendants chose to use the same mark in commerce with the intent to confuse consumers, that the KXD Defendants used the same channels of commerce as Plaintiff to market the Counterfeit Products, used the mark in an infringing manner on the same type of goods Plaintiff markets, and that the Counterfeit Products were inferior and were capable of tarnishing the mark. Therefore the Court finds that the pleading requirements are met for each claim for relief. *See Jada Toys, Inc. v. Mattel, Inc.* 518 F.3d 628, 632 (9th Cir. 2008) (listing factors to consider to show likelihood of confusion); *A.L.M.N., Inc. v. Rosoff*, 757 P.2d 1319, 1324 (Nev. 1998) (using similar factors to determine common law infringement in Nevada).

iii. Philips is Entitled to Substantial Monetary Relief

76. Pursuant to the fourth *Eitel* factor, the Court must consider the amount at stake in relation to the seriousness of the KXD Defendants' conduct. *Philip Morris* USA, 219 F.R.D. at 499 (citation omitted).

77. The KXD Defendants have reaped millions of dollars from their sales of Counterfeit Products, including millions since the Court entered the TRO and preliminary injunction.

iv. No Possibility of Dispute of Material Fact Exists

78. The fifth *Eitel* factor weighs the possibility of a dispute regarding any material facts in the case. *Id.* at 500.

79. The Court has no reservations about the merits of Plaintiff's substantive claims based upon the pleadings. *See Eitel*, 782 F.2d at 1472 (district court may have had reservations as to claims made in pleadings, thus bolstering the court's denial of default judgment). In the instant action, the KXD Defendants' Answers were stricken for their failure to comply with discovery orders, for destruction of evidence, and for general contumacious behavior to the Court. Therefore any lack of evidence for Plaintiff's claims will not be ascribed to Plaintiff.

80. Despite the KXD Defendants' obstruction to discovery, there was still an overwhelming amount of evidence produced as to the legitimacy of Plaintiff's claims. Plaintiff has limited its claims to damages for which there is evidence. There is no doubt in the Court's mind as to the legitimacy of Plaintiff's claims.

v. The Defaults Did Not Result from Excusable Neglect

81. The sixth *Eitel* factor considers the possibility that default resulted from excusable neglect. *Id.*

82. The KXD Defendants have been on notice of this action since its incipient stages. Moreover, the

Court has taken great care to assure that all the KXD Defendants were properly served with notice of the action. The KXD Defendants have been represented by counsel throughout their involvement in this action. During the course of this action the Court has gone to great lengths to assure that the KXD Defendants had notice of pertinent motions, and a chance to respond. There have been many explicit warnings given to the KXD Defendants that their continued contumacious behavior would result in striking their Answers and entering defaults. The Court finds that there is no excusable neglect in this instance.

vi. The Strong Policy Favoring Decisions on the Merits

83. The KXD Defendants' failures and defaults in this case are due to their own willful conduct. The KXD Defendants could have avoided default had they been more forthcoming. As it is, the Court has extended itself as far as it can to afford the KXD Defendants their fair day in court to defend themselves fully. Accordingly, and for the reasons set forth above, the Court finds that all the *Eitel* factors weigh in favor of granting default judgment in this instance.

C. Philips Is Entitled To The Relief Requested

84. The issuance of a permanent injunction, an award of monetary damages, and recovery of attorney fees and costs are the proper subjects of a default judgment for violations of the Lanham Act. *Philip Morris USA*, 219 F.R.D. at 501–503.

i. Philips Is Entitled to a Permanent Injunction

85. Since injunctive and other equitable relief may be granted in accordance with the principles of equity to prevent violations of trademark laws, pursuant to 15 U.S.C. §§ 1116(a), 1125(c)(1), this Court enjoins the KXD Defendants from infringing Philips' DVD+ReWritable & Design trademark.

86. The threat of continuing infringement is evident in light of the strong market for Philips' products and its licensees' products. Granting a broad permanent injunction is therefore warranted.

87. In this action, the KXD Defendants' disregard for Phillips' trademark rights and their failure to comply with the Court's orders in this litigation likewise warrant issuance of a broad permanent injunction against infringement of all Philips' trademarks.

ii. Philips Is Entitled to Monetary Damages under the Lanham Act

88. A successful plaintiff in a trademark infringement is entitled to recover the defendant's profits and any damages sustained by the plaintiff subject to the principles of equity. 15 U.S.C. §§ 1117, 1125(a).

89. The Lanham Act provides a broad ability for courts to assess damages based on the circumstances of the case. *Id.* at § 1117(a). Monetary remedies in trademark infringement cases include (1) an award of the defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. *Intel Corp. v. Terabyte Int'l., Inc.*, 6 F.3d 614, 620 (9th Cir. 1993) (citing *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1405 (9th Cir. 1993)).

90. In counterfeiting cases, the Court is required, absent extenuating circumstances, to award treble

damages or profits, whichever is greater, along with reasonable attorney fees. 15 U.S.C. § 1117(b).

a. Defendants' Profits

91. Pursuant to terms of the Lanham Act, 15 U.S.C. § 1117(b), Philips elects to recover an award of profits from each of the KXD Defendants. The evidence in this case, including the allegations in the FAC and the declarations filed in this action, shows that the KXD Defendants manufactured, advertised, distributed, imported, sold, and/or offered for sale thousands of Counterfeit Products.

92. As required under 15 U.S.C. § 1117(a), Philips has established that the KXD Defendants' gross profits from infringing Plaintiff's products was $37,384,219.80.

93. The KXD Defendants have failed to establish their "elements of cost or deduction claimed" as required under 15 U.S.C. § 1117(a).

94. The KXD Defendants have failed and refused to produce evidence of their costs to offset Philips' evidence of gross sales, and thus failed to meet their burden under the Lanham Act.

95. Therefore, the KXD Defendants' profits under the Lanham Act, 15 U.S.C. § 1117(a), are $37,384,219.80.

b. KXD Defendants' Willful Conduct Merits Trebling the Philips' Damages

96. Where a defendant has intentionally used a mark or designation "knowing such mark or designation is a counterfeit," the district court "shall, unless the court finds extenuating circumstances, enter

judgment for three times [the defendant's] profits or damages, whichever is greater." 15 U.S.C. § 1117(b).

97. In this case, the KXD Defendants' willfulness was pled in the FAC and therefore admitted upon the entry of default. Moreover, the KXD Defendants' ongoing counterfeiting following this Court's orders, including the TRO and preliminary injunction, and continual attempts to hide that infringement through various means, establishes the requisite willfulness and knowledge to treble the damages.

98. Accordingly, the Court awards treble damages on the base damage amount of $37,384,219.80, for an amount of $112,152,659.40.

99. In light of the KXD Defendants' history in dealing in Counterfeit Products, this Court awards the maximum amount of damages available under the Lanham Act to ensure that the KXD Defendants do not continue their intentional and willful infringement. *See Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335–36 (9th Cir. 1990).

iii. Philips is Entitled to Punitive Damages

100. Philips is also entitled to punitive damages pursuant to its claims for deceptive trade practices and unfair competition. Nev. Rev. Stat. §§ 40.005, 598.0915; *see Gen. Motors Corp. v. X-Treme Toys Corp.*, No. CV 07-2065 CAS(PLAx), 2007 WL 4224554, *2 (C.D. Cal. Nov. 26, 2007) (punitive damages available for common law unfair competition claims); *N.Y. Racing Ass'n, Inc., v. Stroup News Agency Corp.*, 920 F. Supp. 295, 304 (N.D.N.Y. 1996) (awarding treble damages for trademark infringement and doubling trebled damages as punitive damage award for unfair

competition based upon "gross, wanton, or willful fraud or other morally culpable conduct").

101. Based on the KXD Defendants' continual attempts to hide their willful infringement, to purposefully defraud consumers, and their continual attempts to circumvent proper licensing procedures with Philips, the Court finds that punitive damages are merited in the amount of $5,000,000.00.

iv. Philips is entitled to Reasonable Attorney Fees and Costs

102. Plaintiff is entitled to reasonable attorney fees and costs for successfully bringing a claim for deceptive trade practice. Nev. Rev. Stat. § 41.600.

103. Given the KXD Defendants' willful infringement, destruction of evidence, efforts to conceal evidence, and general obstruction to discovery, the prosecution of this case was unnecessarily delayed and Plaintiff's attorney fees and costs were needlessly multiplied. Therefore the Court finds that this presents an exceptional case and Plaintiff is also entitled to reasonable attorney fees under the Lanham Act. See 15 U.S.C. § 1117(a), (b).

104. The Court desires a full briefing and grants Plaintiff until July 8, 2008, to Reply to the KXD Defendants Opposition (Dkt. #910) concerning attorney fees and costs.

D. Conclusion

105. Any conclusion of law which is more properly considered a finding of fact, and any finding of fact which is more properly considered a conclusion of law, shall be considered as such.

DECISION

Based upon the foregoing, it is the decision of the Court that Plaintiff Koninklijke Philips Electronics N.V., have judgment against Defendants Astar Electronics, Inc., Shenzhen Kaixinda Electronics Co., Ltd., Shenzhen KXD Multimedia Co., Ltd., KXD Digital Entertainment, Ltd., and Fusheng Liu, a/k/a Liu Fusheng, a/k/a Fu Sheng Liu, for which they are jointly and severally obligated, in the amount of $112,152,659.40 in damages, and $5,000,000.00 in punitive damages. The Court finds that Plaintiff is entitled to recover attorney fees; however the Court desires a full briefing and will allow Plaintiff until July 8, 2008, to file its Reply to the KXD Defendants' Opposition in this regard.

Dated: July 1, 2008.

/s/ ROGER L. HUNT
ROGER L. HUNT
Chief United States District Judge